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LEGAL AND EQUITABLE

RIGHTS AND LIABILITIES

AS TO

TREES AND WOODS.

BY

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PREFACE.

THE Author had occasion, in the early part of the year 1863, to investigate one of the questions discussed in these pages; and he was thus reminded of an opinion, he had long ago entertained, that a collection of the decisions on the subject of Timber and Trees, would be interesting and useful. He thought that the leisure of a Chancery Long Vacation (in these days a clear three months) would afford ample time for this purpose, and he applied himself then to the task, but found he was greatly mistaken as to its duration. The great amount of trouble, which its prosecution has occasioned to him, confirms his belief, that he will have saved much time to his friends, by bringing together materials so widely scattered, and arranging them in some kind of order.

CONTENTS.

	PAGE
GENERAL OBSERVATIONS	1

CHAPTER I.

RIGHTS BETWEEN LESSOR AND LESSEE	2
--	---

CHAPTER II.

RIGHTS BETWEEN TENANT FOR LIFE AND REMAINDERMAN	23
---	----

CHAPTER III.

RIGHTS BETWEEN TENANT IN TAIL AND REVERSIONER	73
---	----

CHAPTER IV.

RIGHTS BETWEEN DEFEASIBLE AND EXECUTORY TENANTS IN FEE	84
---	----

CHAPTER V.

RIGHTS BETWEEN CO-OWNERS IN JOINT TENANCY AND IN COMMON	90
--	----

CHAPTER VI.

RIGHTS BETWEEN MORTGAGEE AND MORTGAGOR	94
--	----

CHAPTER VII.

RIGHTS BETWEEN LORD OF MANOR AND COPYHOLDERS	PAGE . 95
--	--------------

CHAPTER VIII.

RIGHTS BETWEEN PATRON AND INCUMBENT	99
---	----

CHAPTER IX.

RIGHTS BETWEEN THE CROWN AND DEANS AND CHAPTERS .	103
---	-----

CHAPTER X.

RIGHTS BETWEEN THE CROWN AND BISHOP.	106
--	-----

CHAPTER XI.

RIGHTS AS TO CHARITY LANDS	108
--------------------------------------	-----

CHAPTER XII.

RIGHTS BETWEEN REAL AND PERSONAL REPRESENTATIVES .	109
--	-----

CHAPTER XIII.

RIGHTS OF PRIVATE OWNERS WITHIN LIMITS OF FORESTS AND CHASES	114
---	-----

CHAPTER XIV.

PROPERTY IN WINDFALLS	123
---------------------------------	-----

CHAPTER XV.

PROPERTY IN TREES WRONGFULLY CUT : FIRST, AS TO LEGAL WASTE ; SECONDLY, AS TO EQUITABLE WASTE	127
--	-----

CHAPTER XVI.

PROPERTY IN TREES CUT BY ORDER OF THE COURT OF CHANCERY, OR WITH ITS SUBSEQUENT SANCTION	141
---	-----

CONTENTS.

vii

CHAPTER XVII.

	PAGE
REMEDIES AT LAW AND IN EQUITY	151

CHAPTER XVIII.

LIABILITY TO POOR-RATE	171
----------------------------------	-----

CHAPTER XIX.

LIABILITY TO IMPROVEMENT OF ROADS	173
---	-----

CHAPTER XX.

LIABILITY TO SUCCESSION DUTY	175
--	-----

CHAPTER XXI.

PROTECTION TO TREES, ETC., BY CRIMINAL LAW . . .	176
--	-----

CHAPTER XXII.

STATUTORY PROVISIONS FOR GROWTH OF TIMBER . .	178
---	-----

LIST OF CASES REFERRED TO.

- | | |
|---|--|
| <p> ABBOTT v. Hicks, 11
 Abrahall v. Bubb, 27, 74
 Acland v. Atwell, 102
 Allgood, Campbell v., 48
 Alston, Lee v., 10, 128
 Amherst, Leeds v., 167
 Anderton, Harrow School v., 4
 Anglesey, Dibben v., 118, 179
 Annesley, Tooker v., 181, 144
 Anon (Moore), 93
 Anon (Dyer), 5, 6
 Anon (Godbolt), 7
 Archer, Plymouth v., 60, 62
 Askwith, Darcy v., 5, 20
 Aston v. Aston, 31, 57
 Atkins, Wright v., 87, 88
 Attorney-General v. Marlborough, 56,
 74, 83
 Atwell, Acland v., 102

 BAGOT v. Bagot, 132
 Bampton, Dench v., 96
 Banks, Witherington v., 94
 Barlow, Phillips v., 145
 Barnard, Vane v., 29
 Barrington's Case, 118, 179
 Bateman v. Hotchkin, 59, 124
 Belasyse, Wombwell v., 38
 Berrie, Bowles v., 25
 Berriman v. Peacock, 8
 Bewick v. Whitfield, 55, 126, 137, 140
 Bewick, Whitfield v., 125, 127, 163
 Bibye v. Huxley, 11
 Blackett v. Lowes, 95
 Blagrove, Powys v., 165 </p> | <p> Blake v. Peters, 89
 Bloome, Jesus College v., 159
 Boldero, Lushington v., 50, 55, 124,
 135
 Bolton, Powlett v., 129
 Bolton, Williams v., 129, 165
 Bosville, Glenorchy v., 79
 Boulcott v. Winnill, 121
 Bowles v. Berrie, 25
 Bowles, Lewis, Case, 25, 74, 76, 123,
 125
 Bridges v. Stephens, 50
 Bromfield, Ex parte, 111, 112
 Brydges v. Stephens, 7
 Bubb, Abrahall v., 27, 74
 Bullen v. Denning, 16
 Bullock, Pigot v., 149
 Burges v. Lamb, 61, 62
 Burges v. Mawbey, 81

 CAMPBELL v. Allgood, 48
 Channon v. Patch, 9, 123
 Chaplin v. Chaplin, 81
 Chamberlayne v. Dummer, 32
 Chandos v. Talbot, 12, 13
 Charleton v. Charleton, 30
 Cholmeley, Cockerell v., 69
 Cholmeley v. Paxton, 64
 Clavering v. Clavering, 79
 Clavering, Lyddal v., 80
 Clayton, Ex parte, 113
 Clinton, Stamp v., 19
 Coates, Holder v., 8
 Cockerell v. Cholmeley, 69
 Cole, Green v., 154 </p> |
|---|--|

- Collard, Northleigh *v.*, 12
 Compton, Oxenden *v.*, 112
 Cooke *v.* Winford, 29
 Cookes *v.* Whateley, 29
 Cotton, Garth *v.*, 49, 56, 128, 149, 163
 Courtenay *v.* Fisher, 6
 Cowper, Layfield *v.*, 11
 Cray, Lewis *v.*, 143
 Crouch, Doe *d.* Jones *v.*, 15
 Cruise, Sarjeson *v.*, 81
 Cumberland's, Countess of, Case, 9, 11

 Darcy *v.* Askwith, 5, 20
 Dare *v.* Hopkins, 62
 Davies *v.* Wescomb, 149
 Davis *v.* Leo, 42
 Day *v.* Merry, 47
 Day, Williams *v.*, 29
 Dench *v.* Bampton, 96
 Denn *d.* Jodrell *v.* Johnson, 97
 Denning, Bullen *v.*, 16
 Dibben *v.* Anglezey, 118, 179
 Doe *d.* Blewitt *v.* Phillips, 71
 Doe *d.* Jones *v.* Crouch, 15
 Doe *d.* Rogers *v.* Price, 19
 Doe *d.* Ward *v.* Lock, 22
 Doe *v.* Rawding, 82
 Dor, Pyne *v.*, 35
 Doran *v.* Wiltshire, 63
 Downshire *v.* Sandys, 35, 50
 Dummer, Chamberlayne *v.*, 32
 Durham, Bishop of, Jefferson *v.*, 107

 Empson *v.* Soden, 15
 Evelyn *v.* Evelyn, 26, 56
 Eyre, Gower *v.*, 10
 Eyre, Grierson *v.*, 162

 Fawcett *v.* Strickland, 97
 Ferrand *v.* Wilson, 82, 125, 131
 Ferrers, Tamworth *v.*, 42
 Ferrybridge, Rex *v.*, 59, 171
 Finch, Sir Moyle's, Case, 24
 Fisher, Courtenay *v.*, 6
 Fleming *v.* Fleming, 56
 Ford *v.* Tynte, 41, 48
 Francis, Strachy *v.*, 99, 100

 Garth *v.* Cotton, 49, 56, 128, 149, 163
 Gent *v.* Harrison, 146
 Glenorchy *v.* Bosville, 79
 Goodright *v.* Vivian, 19
 Goodwyn *v.* Spray, 90
 Gower *v.* Eyre, 10
 Grant *v.* Gunner, 97
 Green *v.* Cole, 154
 Grierson *v.* Eyre, 162
 Guffy *v.* Pindar, 12
 Gunner, Grant *v.*, 97
 Guy *v.* West, 8

 Habergbam, Stansfield *v.*, 53, 86
 Hagberton, Horsey *v.*, 98
 Hallett, Reg. *v.*, 115
 Halliwell *v.* Phillips, 41
 Hambly *v.* Trott, 155, 162
 Hampton *v.* Hodges, 7
 Harcourt *v.* White, 169
 Harrison, Humphreys *v.*, 7, 94
 Harrison, Gent *v.*, 146
 Harrow School *v.* Anderton, 4
 Heald, Legh *v.*, 17
 Herlakenden's Case, 9, 21
 Herlakenden, Ivy *v.*, 21
 Herring *v.* Dean and Chapter of St. Paul's, 103, 104, 107
 Hewitt *v.* Isham, 20
 Hicks, Abbott *v.*, 11
 Hide *v.* Whistler, 16
 Hill, Wolf, *v.*, 63
 Hippeasley *v.* Spencer, 64
 Hodges, Hampton *v.*, 7
 Hoe *v.* Taylor, 171
 Holder *v.* Coates, 8
 Hole *v.* Thomas, 91
 Hopkins, Dare *v.*, 62
 Horsey *v.* Hagberton, 98
 Holworthy, Whitechurch *v.*, 96
 Hotchkin, Bateman *v.*, 59, 124
 Humphreys *v.* Harrison, 7, 94
 Hussey *v.* Hussey, 82
 Huxley, Bibye *v.*, 11

 Idle's, Walter Case, 25
 Isham, Hewitt *v.*, 20

Ive's Case, 17
 Ive v. Sammes, 18
 Ivy v. Horlakenden, 21

JEFFERSON v. Bishop of Durham, 107
 Jenney v. Brook, 174
 Jesus College v. Bloome, 159
 Johnson, Samuel v., 5
 Johnson, Denn d. Jodrell v., 97

KEKEWICH v. Marker, 53
 Kekewich, Marker v., 52
 King v. Smith, 94
 Kirby, Sadgrove v., 97
 Knight v. Moseley, 99, 107
 Knight, Morden v., 13
 Knight, Bishop of Winchester v., 161
 Knowllys, Martyn v., 91
 Kynnersley, Ormonde v., 132, 166

LAMB, Burges v., 61, 62
 Lansdowne v. Lansdowne, 165, 166
 Lawley v. Lawley, 29
 Layfield v. Cowper, 11
 Lee v. Alston, 10, 128, 161
 Leeds v. Amherst, 167
 Legge v. Legge, 132
 Legh v. Heald, 17
 Leicester Forest Case, 116
 Leo, Davis v., 42
 Lewis v. Cray, 143
 Liford's Case, 19, 106
 Lisle, Marsh v., 142
 Litton, Robinson v., 85, 86
 Lock, Doe d. Ward v., 22
 Lowes, Blackett v., 95
 Lozon v. Pryse, 7, 12
 Lushington v. Boldero, 50, 55, 124,
 135
 Lyddal v. Clavering, 80
 Lyds, Mervyn v., 4

MAHON v. Stanhope, 47
 Maleverer v. Spinke, 9
 Marker v. Marker, 51, 53
 Marker v. Kekewich, 52
 Marker, Kekewich v., 53
 Marlborough v. St. John, 11, 100

Marlborough, Attorney-General v., 56,
 74, 83
 Marsh v. Lisle, 142
 Martyn v. Knowllys, 91
 Mason v. Mason, 110
 Mawbey, Burges v., 81
 Merry, Day v., 47
 Mervyn v. Lyds, 4
 Micklethwaite v. Micklethwaite, 42, 45
 Mildmay v. Mildmay, 142
 Miller, Vowles v., 8
 Minchinhampton, Rex v., 12, 171
 Mirfield, Rex v., 171
 Molyne, Soby v., 12, 14
 Morden v. Knight, 13
 Morris v. Morris, 44
 Moseley, Knight v., 99, 107

NARBERTH-NORTH, Rex v., 171, 172
 Newcastle v. Vane, 125
 Noble, Richards v., 96, 163
 Northleigh v. Collard, 12
 Norton, Simmons v., 10

O'BRIEN v. O'Brien, 31
 Onions, Smallman v., 91
 Ormonde v. Kynnersley, 132, 166
 Osborne v. Osborne, 143
 Oxenden v. Compton, 112

PACKINGTON's Case, 30
 Palmer, Parrott v., 162
 Parlow, Whilster v., 16
 Parrott v. Palmer, 162
 Patch, Channon v., 9, 123
 Paxton, Cholmeley v., 64
 Peacock, Berriman v., 8
 Penton v. Robart, 15
 Perrot v. Perrot, 158
 Peters, Blake v., 89
 Phillips v. Barlow, 145
 Phillips, *Ex parte*, 112
 Phillips, Doe d. Blewitt v., 71
 Phillips, Halliwell v., 41
 Phillips, Smith v., 5, 13
 Pidgeley v. Rawling, 58
 Pierce, Sayer v., 161
 Pigot v. Bullock, 149

Pincomb *v.* Thomas, 17
 Pindar, Guffly *v.*, 12
 Platt *v.* Powles, 78
 Plymouth *v.* Archer, 60, 62
 Powles, Platt *v.*, 78
 Powlett *v.* Bolton, 129, 130
 Powys *v.* Blagrave, 165
 Price, Doe *d.* Rogers *v.*, 19
 Pryse, Lozon *v.*, 7, 12
 Pulteney *v.* Warren, 162
 Pyne *v.* Dor, 35

RAWDING, Doe *v.*, 82
 Rawling, Pidgeley *v.*, 53
 Reeve, Tregmiell *v.*, 22
 Reg. *v.* Hallett, 115
 Rex *v.* Ferrybridge, 59, 171
 Rex *v.* Minchinhampton, 12, 171
 Rex *v.* Mirfield, 171
 Rex *v.* Narberth-North, 171, 172
 Richards *v.* Noble, 96, 163
 Robart, Penton *v.*, 15
 Robinson *v.* Litton, 85, 86
 Rolt *v.* Somerville, 13
 Roswell's Case, 158

SADGROVE *v.* Kirby, 47
 St. John, Marlborough *v.*, 11, 100
 St. Paul's, Dean and Chapter of, Her-
 ring *v.*, 103, 104, 107
 Sammes, Ive *v.*, 18
 Samuel *v.* Johnson, 5
 Sandys, Downshire *v.*, 35, 50
 Sarjeson *v.* Cruise, 81
 Saville's Case, 79
 Sayer *v.* Pierce, 161
 Sealey, Sergeson *v.*, 81
 Sergeson *v.* Sealey, 81
 Shelley's Case, 76
 Simmons *v.* Norton, 10
 Skelton *v.* Skelton, 26, 27, 74
 Smallman *v.* Onions, 91
 Smith, King *v.*, 94
 Smith, Phillippis *v.*, 5, 13
 Smythe *v.* Smythe, 48
 Soby *v.* Molyns, 12, 14
 Soden, Empson *v.*, 15
 Somerville, Rolt *v.*, 132

Spencer, Hipplesey *v.*, 94
 Spicer, Vincent *v.*, 49, 165
 Spinke, Maleverer *v.*, 9
 Spray, Goodwin *v.*, 90
 Stamp *v.* Clinton, 19
 Stanhope, Mahon *v.*, 47
 Stansfield *v.* Habergam, 58, 86
 Stephens, Bridges *v.*, 50
 Stephens, Brydges *v.*, 7
 Strachy *v.* Francis, 99, 100
 Strickland, Fawcett *v.*, 97

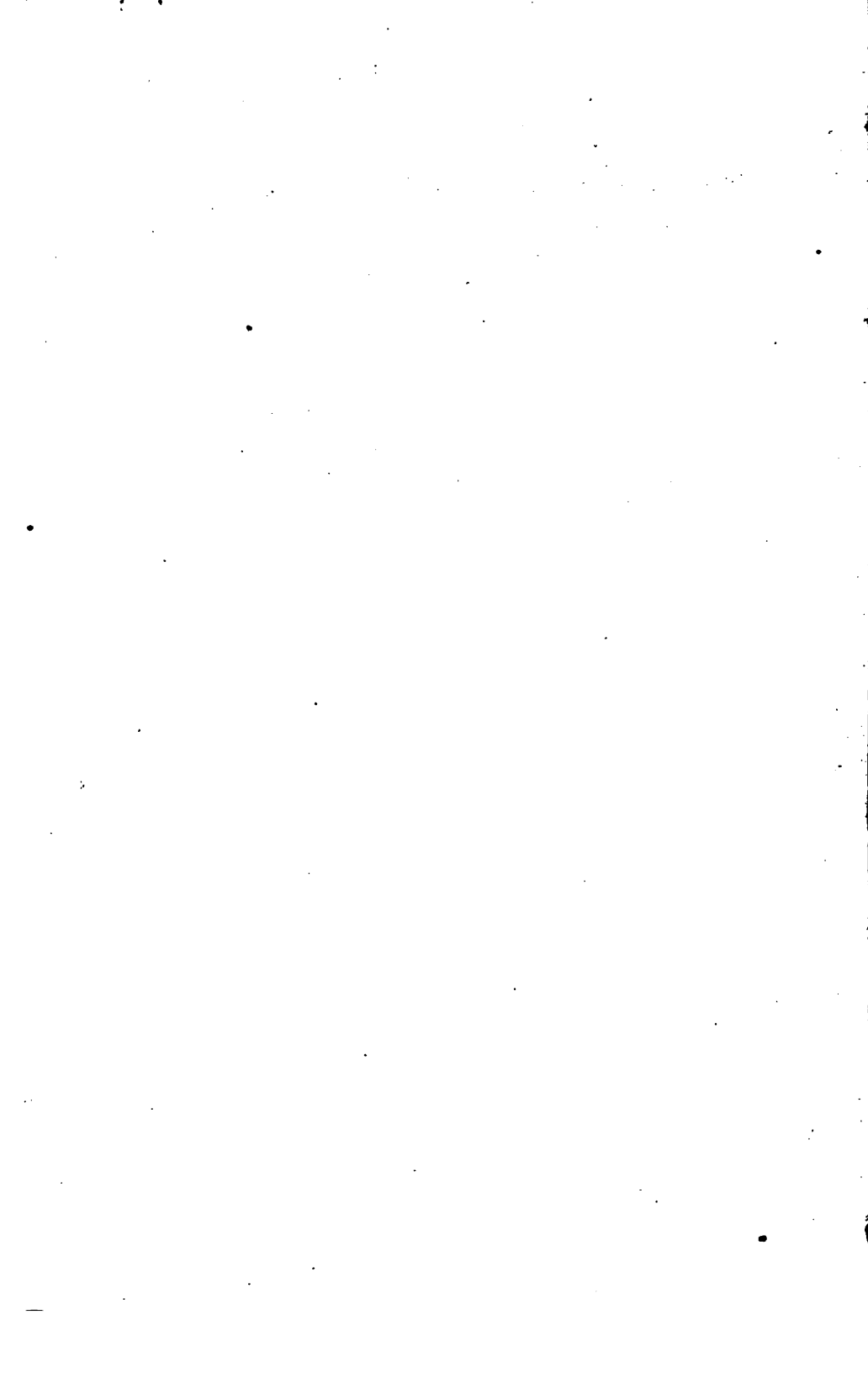
TALBOT, Chandos *v.*, 12, 13
 Tamworth *v.* Ferrers, 42
 Taylor, Hoe *v.*, 171
 Thomas, Hole *v.*, 91
 Thomas, Pincomb *v.*, 17
 Tooker *v.* Annesley, 131, 144
 Tregmiell *v.* Reeve, 22
 Trott, Hambly *v.*, 155, 162
 Tryon, Walton *v.*, 11, 12
 Tullit *v.* Tullit, 84, 110, 111
 Turner *v.* Wright, 35, 78, 81, 83, 85,
 87, 89, 110
 Twort *v.* Twort, 91
 Tynte, Ford *v.*, 41, 48

UDAL *v.* Udal, 127
 Usher, Wardell *v.*, 15

VANE *v.* Barnard, 29
 Vane, Newcastle *v.*, 125
 Vincent *v.* Spicer, 49, 165
 Vivian, Goodright *v.*, 19
 Vowles *v.* Miller, 8

WALDO *v.* Waldo, 64, 131, 144
 Walton *v.* Tryon, 11, 12
 Wardell *v.* Usher, 15
 Warren, Pulteney *v.*, 162
 Way, Wyndham *v.*, 16
 Welbeck's Case, 125
 Wellesley *v.* Wellesley, 43
 Wescomb, Davies *v.*, 149
 West, Guy *v.*, 8
 Whateley, Cookes *v.*, 29
 Whilster *v.* Parlow, 16
 Whistler, Hyde *v.*, 16

- | | |
|---|--|
| White, Harcourt <i>v.</i> , 169 | Winford, Cooke <i>v.</i> , 29 |
| Whitechurch <i>v.</i> Holworthy, 96 | Winmill, Boulcott <i>v.</i> , 121 |
| *Whitfield <i>v.</i> Bewick, 125, 127, 163 | Wither <i>v.</i> Dean and Chapter of Win- |
| Whitfield, Bewick <i>v.</i> , 55, 126, 137, 140 | chester, 11, 100, 103, 107 |
| Wickham <i>v.</i> Wickham, 144 | Witherington <i>v.</i> Banks, 94 |
| Williams <i>v.</i> Bolton, 129, 165 | Wolf <i>v.</i> Hill, 63 |
| Williams <i>v.</i> Day, 29 | Wolgar, Bishop of Winchester <i>v.</i> , 26, |
| Williams <i>v.</i> Williams, 29, 75, 77 | 107 |
| Wilson, Ferrand <i>v.</i> , 82, 125, 131 | Wombwell <i>v.</i> Belasyse, 38 |
| Wiltshire, Doran <i>v.</i> , 63 | Wright, Atkyns <i>v.</i> , 87, 88 |
| Winchester, Bishop of, <i>v.</i> Knight, 161 | Wright, Turner <i>v.</i> , 35, 78, 81, 83, 85, |
| Winchester, Bishop of, <i>v.</i> Wolgar, 26 | 87 |
| Winchester, Dean and Chapter of, | Wyndham <i>v.</i> Way, 16 |
| Wither <i>v.</i> , 11, 100, 103, 107 | |



Waste is a trespass or tort: consequently right of action for the same cannot be assigned *inter vivos*
Defence Indue 1913 1 Ch 98 but this I much doubt

See my Articles in the Law and actio personalis quoritur can persona,

If tenure for years did not, his executors though liable for debt committed by themselves, were on the whole, not liable for their debtor's note Breche At: Waste 138 citing 23 Horn Co: Litt 536 Coke 2nd Inst 301 except to the extent that they had increased the debtor's assets

TREES AND WOODS.

GENERAL OBSERVATIONS.

AN owner of lands, upon which trees stand, may deal with the trees as he pleases,—if the lands are of freehold tenure, if his interest is a fee simple or a fee tail, if it is in possession, if it is not liable to be defeated, or put an end to, by any contingency, if his enjoyment is not shared by any co-owner, as joint tenant or tenant in common, if he is in personal occupation, if he is not subject to any charge or incumbrance, or to any agreement for a lease, or to any right of estovers (in common or otherwise), or to any forestal rights of the Crown or its grantees, and if the trees do not assist to keep up the bank of a stream in which other persons are interested; but, unless his position, with reference to his lands and the trees upon it, answers precisely to this description, he will find, from the following pages, that his rights to the trees are more or less limited; and he will even find that the enjoyment of the most absolute right to trees is subject to some minor liabilities for the public advantage, and that he needs some legal protection for its security.

It is comparatively seldom that a landowner's interest is, in all respects, what is thus described: and whenever it is not, it is important that he should know, as accurately as he can, what his rights and his duties are. It is hoped that the subdivisions to be presently stated and explained will assist his inquiries in this respect.

CHAPTER I.

RIGHTS BETWEEN LESSOR AND LESSEE.

A LEASE for years, or from year to year, of land, without mentioning trees, will give to the lessee, during his tenancy, certain rights to the use and enjoyment of all trees, standing, or to stand, on the property; and the lessor must not touch them. The rights of the lessee, if unrestricted by express stipulation, are,—to enjoy the shade, shelter, and fruit of the trees; to cut down and appropriate all such of them as are not timber, or fruit-trees, unless planted or left standing for ornament, or unless affording permanent shelter or shade; to lop those which are timber, for necessary repairs of hedges, and husbandry-implements, and for fuel, and, if necessary, to cut down the timber-trees themselves for repairs to houses and principal buildings. These rights for repairs and for firing are described as his “botes.”

The bodies of dead timber-trees, when blown down by the wind, or cut by the lessor, are absolutely the property of the lessee; and it is presumed he may fell them himself, if they are obviously dead; for it is laid down that he may not make firewood of timber trees, if there is dead wood enough on the premises; which seems to make all dead wood his own [see Co. Lit. 53, b]; and even if all timber-trees are reserved to the lessor, so that he may come on the land to cut them, yet if one which he cuts proves to have been decayed at the date of the lease, it may be claimed by the lessee. Whether it could be so claimed, in such a

case, if proved to have become decayed since the lease was granted, seems a point undecided. The repairs for which alone timber-trees may be cut, are such present necessary repairs of existing houses, buildings, fences, or implements, as it is the lessee's duty to do; and he may not cut down any fruit-trees (popularly so called) in a garden or orchard: and the timber he cuts for repairs must be specifically used in the work, and not sold for money, or exchanged for seasoned timber.

The underwood on the land may be cut by the lessee for his own profit, at the periodical times which usage on the spot, or the custom of the country, has established; but, it seems, not before or after those times; and he must not grub it up, or suffer its germins to be eaten by cattle, or otherwise injured.

The lessee may trim hedges, but he must not root them up. The trimmings will belong to him.

Any excess in the exercise of the lessee's rights in these respects will be waste; and, in particular, it will be waste to cut or lop timber-trees except for such necessary repairs and fuel as can only be supplied by means of those trees or their loppings. If the trees be excepted from the lease, it will be trespass to touch them.

It is obvious that rights, so extensive as these, ought usually to be abridged. Such an abridgment may be made, either by excepting the trees from the lease, or by requiring the lessee to do his repairs at his own cost, and with his own materials, and to provide his firewood in like manner; and he may, if desired, be expressly restricted from interfering with those trees which are not timber; and there may be express covenants by the lessee not to do waste generally; which covenants, although not extending the lessor's rights, may make them more easily available.

The lessee has no right to claim a sound timber-tree, if blown down; but he may, perhaps, have a right to a windfall

of trees which never were timber, although they be sound, because he might have cut them himself without being chargeable with waste. The question is believed to be open.

As to pollard timber-trees, the lessee seems to have no greater rights over them than he has over trees which are entire, or "maiden," as the technical term seems to be; but if he has a right to take loppings at all, it would be expected that he should take them from trees already polled, if he can.

There have been doubts about pollards being timber, but the result of the authorities seems to be, that, if their bodies are sound, they are as much timber as entire trees of the same kind would be, and that the only distinction between the two is one of fact, namely, that the polling makes them more liable to decay, and that, if decayed, they are neither more nor less timber than a decayed unpolled tree would be.

To verify these positions by authorities:—The lessee's rights to his "botes" will be found stated in Co. Lit. 53, a, *et seq.*, with the restrictions upon them: and the acts which will or will not be waste on his part, will there be found to be such as just stated; and the same rights and restrictions may be seen in Fitzherbert's "Natura Brevium," 55; Viner's Abridgement, tit. "Waste;" and Comyn's Digest, *ib.*

It will be observed that Lord Coke says, that waste must be of the value of forty pence, at the least, to justify a complaint of it. To the same effect is the case of *Harrow School v. Anderton* (2 Bos. & Pull. 86).

That a lease of the land includes the trees, without mention of them, was expressly decided in the case of *Mervyn v. Lyds*, in 1553 (Dyer, 90, a), where this law was laid down by the Court:—"The woods and trees are parcel of a lease, and pass to the lessee as well as the land, if they are not excepted by it; and, in proof of this, all fruits and profits arising from the fruit-trees shall be the lessee's, and the

shadow, and also the branches and loppings for fuel, or inclosure of fences; and although it would be a good bar in waste for the lessee to say that his lessor, who is the plaintiff, did the waste, yet if the lessor cut down the trees without the licence or against the will of the lessee, an action of trespass well lies against him by the lessee."

On the other hand, it was held in the same Court, in 1580, by three Judges to one, that an express demise of a farm and all timber upon it, except the great oaks in one close and about the house, did not give a right to fell the oaks or any other timber-trees in any other part of the farm, without such urgent necessity for repairs of buildings as before mentioned. (See *Anon.*, Dyer, 374, b.)

So, a demise of woods growing upon lands containing unopened mines or quarries, with liberty to open and work the mines or quarries, will not give right to cut down and use the timber in the mining operations, or even to clear off the wood from more of the land than must necessarily be cleared for opening the mines or the quarries. See *Lord Darcy v. Askwith*, 15 Jac. I. (Hob. 234, stated *infrd.*)

A very strong proof of the right of a lessee to cut and appropriate trees, which are not timber, if they do not serve for shelter or shade, is the late case of *Phillipps v. Smith*, 1845 (14 M. & W. 589), where a tenant from year to year of a farm in Leicestershire had cut down, for sale, large pollard willows, standing by the side of a brook, of the value of 64*l.*; and this was held not to be waste, and, therefore, not to be farming contrary to the common law, which would make the tenant liable for an action of assumpsit, for farming in a bad and untenant-like manner.

It appeared that the bank of the stream, by which the trees grew, was not injured by cutting them, and that new shoots would spring from their stumps.

As to the tenant's right to lop and top timber-trees, see a case of *Samuel v. Johnson*, in the third year of Edward VI.,

reported thus by Dyer (65, a):—" Note, that an action of waste was brought by *Samuel* against *Johnson*: and the waste assigned was for cutting and topping forty ashes and twenty elms, of the value, &c., and there was a demurrer at law, whether that should be adjudged waste? And upon good consideration, it was adjudged waste in C. B., in Michaelmas Term, in the first year of the now king, Rot. 719."

By this it was probably meant, that the cutting and topping (which seems to mean lopping and topping), was not necessary for repairs, or for fuel: for in a previous case in the same book, *Anon.*, Dyer, 19, b, 28 Hen. VIII., where the question related to cutting thorns for fuel, it is laid down that "by our books the law is, that a termor shall have loppings and shrowdings of trees for necessary fuel."

Questions will arise as to the manner in which "botes" are to be taken, and whether, if the lease provides that timber for them is to be assigned by the landlord or his agent, and a standing tree is so assigned, it is to be cut by the landlord, or by the tenant; and if by the latter, how soon after the assignment?

In *Courtenay v. Fisher*, 1826 (4 Bing. 3), there was a lease for ninety-nine years, *trees excepted*, with a proviso, that if the lessee should permit the premises to decay for want of repairs, he having sufficient house bote, gate bote, and bar bote, by "delivery" of the known steward or bailiff of a manor, the lease should be void. The bailiff assigned a standing oak-tree, in April, which the tenant cut in October following. The bailiff had, meanwhile, been discharged. The landlord brought an action of trespass for cutting and carrying away the tree, insisting that it should have been cut by the bailiff; or, if by the tenant, immediately upon assignment. The Court held that the tenant was justified in cutting the tree when he did, and

that it had been sufficiently "delivered" to him, by pointing it out while still standing.

With respect to underwood, Lord Eldon has said, it has always been considered a crop; and he refused to restrain a mortgagor from cutting it, even in the case of a deficient security; but he offered an injunction to restrain the cutting of it contrary to the usual course of husbandry. See *Humphreys v. Harrison*, 1820 (1 J. & W. 581). The same principle evidently applies between lessor and lessee.

In *Brydges v. Stephens*, before Sir John Leach (6 Mad. 279), he expressed an opinion that the Court would restrain cutting underwood of insufficient growth; and Lord Eldon seems to have given a similar opinion in *Hampton v. Hodges* (8 Ves. 105).

To show that underwood must be cut in the proper year, or not at all, see *Anon.*, 23 Eliz. in C. P., reported by Godbolt (p. 4), where it was held by Dyer, C. J., and the other Judges, that if underwood be seasonably cut every twenty-one years, by the custom of the country, a tenant for life cannot cut it when of twenty-five years' growth. And they said, "In the wood countries, they may fell seasonable wood, which is called *Sylva Cædua*, at six-and-twenty, eight-and-twenty, thirty years, by the custom of the country; and so the usage makes the law in several countries." They agreed that the cutting of oaks of the age of eight years or ten years was waste; and Meade, J., said that the cutting of hornbeams, hazels, willows, or sallows, of the age of forty years, was no waste; because at no time they would be timber.

It must also, however, be borne in mind, that underwood of twenty years' growth from timber-stools becomes timber itself; and, as such, it was exempt from the payment of tithes. See Lord Cottenham's decision, in *Lozon v. Pryse* (4 M. & C. 600).

Upon trimmings of hedges, a case recently arose, where the lessee allowed a neighbouring occupier, unconnected with the

lessor, to trim the lessor's hedge, and then the lessee appropriated the cuttings made in trimming; and it was held that they, upon being severed, became the property of the lessee, and not of the lessor. *Berriman v. Peacock* (9 Bing. 384). The principle was declared to be, that the general property in all bushes is in the lessee, during the term, although he cannot root them up at the end of it.

As to ownership of trees in a hedge-row, between the land of two proprietors [or two lessees], the better opinion seems to be, that it is in that proprietor [or lessee] in whose land they have been first planted or sown, if that can be ascertained; but if not, the property must be determined by proof of acts of ownership: See a case of *Holder v. Coates*, 1827 (*Moody v. Malkin*, 112), before Littledale, J., where older authorities are contrasted, and where the rules of the civil law and of the French code are referred to in the notes.

The ownership of a boundary hedge seems clearly to be in that proprietor in whose land the ditch is not: the principle being, that the ditch must have been dug by the maker of it in his own land, because he could not dig it in his neighbour's, without trespass; and he must have thrown up the spoil upon his own land also, because he could not throw it on his neighbour's; and it is on the bank formed by such spoil that the hedge stands; see *per* Lawrence, J., in *Vowles v. Miller* (3 Taunt. 137); and see 2 Selw. N. P. 1324 (11th edit.); but if there is a ditch on each side of the hedge, the ownership of the hedge must be determined by proving acts of ownership. See Selw. N. P., *ib.*, referring to *Guy v. West, Somerset Sum. Ass.*, 1808, Bayley, J.

To show that if trees be "dotards, without any timber in them," (which seems to mean if they have become decayed, whether pollards or not), and they be blown down by the wind, the property in them vests in the lessee and not the lessor, see the third resolution in *Herlakenden's Case* (4 Co.

63, b); and the *Countess of Cumberland's Case*, in 8 Jac. (Moor, 812). That the same result attends their being cut by the lessor, even although all timber-trees be expressly reserved to him, with liberty to fell and carry them away, see *Channon v. Patch*, 1826 (5 B. & C. 897). In that, a Devonshire, case, Mr. Buller, the reversioner of a lease, with such a reservation, cut down, besides certain timber-trees, two decayed pollard oaks. He barked them on the spot, dried the bark there, and then took it home; but the two oaks themselves remained, for some months, on the land, and then were sold by Mr. Buller to the plaintiff; but the defendant, the lessee, insisted upon appropriating them for firewood: and this he was held entitled to do, on the authority of *Herlakenden's Case*; the jury having found that, when felled, they were decayed, and only fit for firewood, and that they were so at the date of the lease, and were unfit for any of the ordinary building uses. The lease was a lease for years, fifty-nine years old, determinable on lives.

In this case, the cutting of the trees by the reversioner was treated as a wrongful act; from which it is to be inferred, that a reservation of timber-trees, with the right to cut and carry them away, does not entitle the reversioner to cut any trees which are not in a sound state; or, at the least, not any of those which had already become unsound when the lease was granted.

As to the necessity of using the identical timber, Lord Coke's words are very strong. He says:—"The tenant cutteth down trees for reparations, and selleth them, and after buyeth them again, and employs them about necessary reparations; yet it is waste by the vendition. He cannot sell trees, and with the money cover the house." Co. Litt. 53, b. *The cutting must be applied in repairs within convenient time*
1104 h 127, 128

In a case of *Maleverer v. Spinke*, T. T., 29 Hen. VIII., reported by Dyer, 35, b, and decided by two Judges only, Mountague and Knightley, where the plaintiff declared upon

waste committed by cutting and *selling* ash-trees, it was held no sufficient plea to say that no waste had been done; for that a special answer must be given as to the selling; for, "suppose he cuts them, and sells them, and buys them back again, and then uses them in repairing the house, yet the tort, which is supposed in the selling, is not answered."

In the same case, it was held that if a house be ruinous at the date of the lease, the lessee is not justified in cutting oak timber to repair it; "for in other state than the land was at the time of the lease, the termor is not bound by law to make repairs." And the Judges also very sensibly suggested, that if the right to cut timber-trees for repairs be ever so clear, the fairer course towards the lessor would be, to give him an opportunity of doing the repairs himself, rather than at once to cut down trees, "than which, perhaps, the lessor would rather give him one hundred pounds, by reason of some convenience which he has in such trees; as in trees growing within the scite of the manor, in defence of it."

Gower v. Eyre (G. Cooper, 156) is a decision, so late as the year 1815, by the Master of the Rolls, Sir. W. Grant, that a tenant for life, impeachable of waste, but entitled to cut timber for repairs, must use the specific timber cut; and that if he sells it, and applies the produce in the repairs, he may be compelled to account for and pay its value to the remainderman.

The case was decided against the tenant for life, Lady Eyre, on the authority of Co. Lit. 53, b, and of *Lee v. Alston*, before Lord Thurlow, although the references to the report of that case should have been, not to 3 B. C. C. and 1 Ves. Jr., but to a former stage of it, reported in 1 Bro. C. C. 194, where Lord Thurlow intimates that "botes" must not be taken from one estate to repair another estate, although both be held (at the time) by the same title.

So, in *Simmons v. Norton*, 1831 (7 Bing. 640), where an

action of waste was brought by lessor against lessee, to which "*nul wast*" was pleaded. The waste charged and proved was cutting down timber-trees. The defendant offered to show that the trees had been cut with a view to repairs, but being found unfit, had been exchanged for fit timber; (and it may be assumed that the repairs had been done). The Judge refused to allow this evidence to be given; and his ruling was upheld by the full Court, on the ground that the facts, if a justification, should have been specially pleaded; but they intimated that if a tenant is authorised to cut timber for repairs, he must, at his own peril, cut such as is fit to be specifically so used, and must employ it accordingly.

In the still later case of *Duke of Marlborough v. St. John*, before V.-C. Parker, in 1852 (5 D. & S. 174), which was a bill by a patron against a rector, his Honour evidently considered Lord Coke's rule about "waste by the vendition" as still in force, notwithstanding a suggestion by Lord Eldon, in *Wither v. Dean and Chapter of Winchester* (3 Mer. 421), that ecclesiastical corporations aggregate, with several estates, might, perhaps, justify selling the timber on one estate to buy timber for repairs on another.

This leads to the question, What trees are timber? The answer is, oak, ash, and elm are timber, throughout all England; and other trees are timber in particular parts of the country, by special custom. Thus, beech is timber in Buckinghamshire, Co. Lit. 53, &c., and 10 East, 446; and birch in Berkshire, 2 Ro. Ab. 814; and in Yorkshire, *Countess of Cumberland's Case* (Moor, 812). Beech has been proved or admitted also to be timber in the parish of Buriton, in Hampshire, see *Layfield v. Cowper*, 1694 (1 H. Wood's Tithe Cases, 330); and in Whipmead, in Bedfordshire, see *Bibye v. Huxley*, 1724 (2 Gwill. 657, 2 H. Wood, 238, Bunb. 192); and in Mickleham, in Surrey, see *Walton v. Tryon*, 1751 (2 Gwill. 827, Ambler, 130); and in Whitcomb Magna and Minchinhampton, both in Gloucestershire, see *Abbott v.*

Hicks, 1694-6 (1 H. Wood, 319), *Rex v. Minchinhampton* (3 Burr. 1308).

So even willows seem to have been held timber, by custom, in Mottesfont, in Hampshire, *Guffly v. Pindar*, 14 Jac. I. (Hob. 219).

The decisions on the tithe laws afford frequent authority on the question of "timber, or not timber?", in particular places; because timber-trees, even when felled, were exempt from tithes. A notion, however, formerly prevailed that no timber-tree under twenty years of age was exempt from tithes when felled. Lord Cottenham has elaborately shown, in the case of *Lozon v. Pryse*, 1840 (4 M. & C. 600), that the clergy were never entitled to tithe from timber trees of any age, if growing from seed; but that they did claim tithe of timber from stools, of whatever age it might be; and that the effect of the statute of *Sylva Cædua*, 45 Edw. III. c. 3, 1371, was merely to declare that timber springing from stools, if of twenty years' growth, was as much exempt from tithe as timber growing from seed of any age was; it having then become "gros bois," great wood, within the meaning of the statute.

The authorities as to pollard timber-trees seem to stand thus. In *Duke of Chandos v. Talbot*, before Lord King, in 1731 (2 P. W. 601), upon a question whether pollards were to be included in a valuation under a contract which provided that all timber-trees on an estate should be valued to a purchaser, his Lordship held that they should be so valued, if their bodies were sound, notwithstanding what was supposed to have been said in the case of *Soby v. Molyne*s (Plowd. 470), but which does not in fact seem in point.

There had been a tithe cause in the Exchequer in 1694, *Northleigh v. Collard*, relating to Walthamstow, in Essex, in which it was declared that the lops of oak pollards should not be included in an account of tithes. In *Walton v. Tryon*, before Lord Hardwicke in 1751, reported best in 2 Gwillim

(p. 827, see also Ambler, 130), a tithe cause relating to Mickleham, in Surrey, tithes were claimed of the loppings of pollard oaks and ashes, which were admitted to have been ancient trees; but the Court held, that if they had not been lopped at all until after twenty years old, no tithes were to be paid for the loppings of them, upon the ground that, although pollards, they were still timber, whatever use might be made of their wood: and as the rector declined to take an issue upon their age when first lopped, the bill was dismissed as to them.

In *Morden v. Knight*, in the Exchequer, 1752 (2 Gwill. 841), the Rector of Cantley and Southwood, in Norfolk, was held not entitled to tithes of the top wood cut from pollard trees and used as billets and faggots, because it was "cut from trees of above the growth of twenty years before they were made pollards." In Woodfall's "Landlord and Tenant," it is said (p. 490, 8th ed. by Cole), that at the Suffolk Summer Assizes in 1803, before Macdonald, C. B., the value of pollards was recovered as timber and timber-like trees.

Finally, in *Phillipps v. Smith*, 1845, already mentioned, *ante* p. 5 where there was great discussion whether cutting large willow trees was waste, the circumstance of their being pollards (as they were) was not relied upon, on either side, or by the Court in its judgment.

It is a reasonable precaution, in the conditions of sale of a landed estate, when timber is to be taken at a valuation, to specify with precision the trees to be paid for, lest disputes should arise as to whether the custom of the country does not make other trees timber, besides oak, ash, and elm.

In *Duke of Chandos v. Talbot* (just mentioned), a suit for *specific performance*, the contract stipulated that the coppice and timber should be valued, and paid for by the Duke. The decree ordered that the timber should be valued by two

indifferent persons to be appointed by the Master. The Duke excepted to the Master's report, because the valuation included young saplings worth twelve pence or eighteen pence a-piece (amounting to more than 400*l.*) and pollards, and also "walnut trees which were not timber, though some of them were worth 20*l.* and others 40*l.* a tree; also yew, cherry, crab, and horse-chestnut trees."

The Lord Chancellor said it was the custom of the country which made some trees timber, which, in their nature, generally, speaking, were not so, as horse-chestnut and lime-trees; so of birch, beech, and asp: and as to pollards, notwithstanding what was said in *Plowden*, 470, in the case of *Soby v. Molyne*s, that these are not timber, and that tithes are not to be paid of their loppings (which could not be if pollards were timber), yet if their bodies were sound and good, he inclined to think them timber; *secus*, if not sound, they being, in such case, fit for nothing but fuel.

As to the walnut-trees, he said, that if a timber-tree which may not be worth 3*l.* or 4*l.* shall be valued or paid for in the purchase, why not walnut-trees, some of which may be worth 10*l.*, 20*l.*, or even 50*l.* a-piece? He added, that as the trees in dispute appeared valuable, unless the parties could agree to lump the valuation, he should direct an issue to try whether any and which of them were, by the custom of the country, to be accounted timber.

Although it be waste to cut down fruit-trees in a garden or orchard, it is probable that any such act done in a course of judicious management would be excused; thus:

A covenant in a lease of a house and orchard was to deliver up the premises, at the end of the term, in good repair, "and all the trees which are now standing in the orchard of the said premises, whole and undefaced, reasonable use and wear only excepted," with a proviso for re-entry on breach of covenant. The defendant cut down nine trees [fruit-trees] in different parts of the orchard, but they were decayed and

past bearing; and an equal number of thriving young trees were planted by him in another part of the ground demised; and the orchard was greatly too much crowded with trees. An ejectment being brought, on these facts, for a forfeiture, Lord Ellenborough, at Nisi Prius, held that the removal of trees past bearing was a reasonable use of such an orchard: *Doe d. Jones v. Crouch*, 1810 (2 Camp. 448). Fruit-trees generally, and even a border of box planted in a garden, cannot be taken away by a tenant at the end of the term, (whether planted by himself or not) unless he be a nurseryman. See *Empson v. Soden*, 1833 (4 B. & Adol. 655). If he be a nurseryman, it seems probable he would be allowed to remove all plants, shrubs, and young trees which constituted his own stock in trade. See *Penton v. Robart*, by Lord Kenyon, C. J., 1802 (2 East, 90), and *Wardell v. Usher*, 1841 (3 Scott, N. R. 508); at least, unless they have become too old for transplanting, and, therefore, are permanent parts of the freehold; *ib.*

To show that it is waste to fell trees which afford shelter to the house, and in some instances to a farm-house, and even permanent shelter or shade for cattle, whether the trees are timber or not, see Co. Lit. 53, and 14 M. & W. 590, where the Year Book of 12 Hen. VIII., 1, b, is quoted to show that it is waste to cut willows "si sont in view d'un manoir [manor house] pour defendre le vent, ou sont in un banc, pour sustener le banc;" also, *ib.* 595. So it is incidentally stated by Hobart, C. J., in his Reports, p. 219, to be law, that "if willows grow within the scite of an house, it is waste to fell them."

The practice of excepting trees from a lease has given rise to many questions as to the meaning and effect of such exceptions; and these results appear:—

1. An exception of "all trees," will not except fruit-trees, unless the excepting words cannot be otherwise satisfied.
2. The exception of "woods," and sometimes of "under-

woods," will except the wood-lands, known by the name of woods; but the exception of "trees" will except only so much of the soil as nourishes each particular tree.

3. An exception of trees makes it trespass, and not waste, in the lessee, to fell them or lop them.
4. The mere exception of trees reserves to the lessor the right to enter on the land, to show them, to sell them, to cut them, to carry them away, and even to saw them up in pits on the spot.

Thus, 1st, as to fruit-trees: see *Wyndham v. Way*, 1812 (4 Taunt. 316). There, a lease had been made of a Devonshire farm, excepting all trees, woods, coppice, and wood-grounds, of what kind or growth soever. The reversioner brought his action of trespass against the tenant for "heading" apple-trees, by way of improvement; and the question argued was, whether the apple-trees were excepted from the lease? It was held they were not—therefore, "trespass" would not lie. In the report, and its notes, are stated several old cases, to show that a grant of all trees will not include fruit-trees, unless there be some words to show that fruit-trees were intended; as, for instance, by a grant of all trees, except apple-trees, fruit-trees will pass, if not apple-trees: and in *Bullen v. Denning*, 1826 (5 B. & C. 842), it was held, that an exception from a Dorsetshire lease, of all timber-trees and other trees, but not the annual fruit thereof, and all saplings and standils likely to become trees, did not except apple-trees; and the words of sub-exception relating to fruit, were satisfied by referring them to timber-trees alone, inasmuch as the old authorities constantly spoke of timber-trees bearing fruit.

2nd. As to the meaning of an exception of "Woods," or of "Trees."

In *Whilster v. Parlow*, T. T., 16 Jac. I., K. B. (Cro. Jac. 487, called *Hide v. Whistler*, Poph. 146), we are told that

"this difference was taken betwixt the exception of wood and underwood, and the exception of all timber-trees; for, in the first, the soil itself of the wood and underwood, and what is known by that name, is excepted; but, in the last case, no soil is excepted, but only so much as is sufficient for the vegetature and growing of the trees excepted."

In the next Hilary Term, a case in the same court, *Pincomb v. Thomas* (Cro. Jac. 525), is thus reported:—"One lets a tenement, a close whereof was a wood, and commonly known by the name of a wood; and in the lease was an exception of all saleable woods, now growing, or which shall grow hereafter, which have been sold by the lord of the premises, with free entry, egress and regress, for felling, marking, and carrying off the same, at all times convenient: and whether the soil of the wood was passed hereby was the question? and resolved, by all the Justices, clearly, that in this case, the soil was not excepted, but passed to the lessee." This case, probably, turned on the word "saleable," which is also used in the Poor Law Act of 43 Elizabeth, afterwards stated in these pages. The "vegetature and growing of the tree," seems to have been understood by Lord Tenterden, as being the soil in which the tree stands, in the sense of meaning nothing on either side of any of its roots (see *Legh v. Heald*, 1830, 1 B. & Adol. 622).

There is, indeed, a report of a case in the 33 Eliz. in the Q. B. (1 Leon, 247), in which a demise from the Crown, of underwoods by name (amongst other things), but followed by the words, "exceptis omnibus grossis arboribus, boscis, et maremio," was held *not* to be a lease of the cuttings of the underwoods: but this was evidently a forced construction, in favour of the Crown.

It will be necessary here to notice *Ive's Case*, in Coke, which is often referred to on this subject, but the precise decision in which is not much in point.

In *Ive's Case* (*Ive v. Sammes*), in M. T., 39 & 40 Eliz. (5 Co. 11, a, Cro. Eliz. 521), a lease was made of the Manor of Tottenham, in Essex, for thirty years, "except all woods and underwoods growing or being on the manor:" then a second lease was made to the same lessee, for sixty-two years, of all the woods and underwoods growing or being on the manor, without impeachment of waste: and then a third lease was made to the same lessee, for thirty years, of the manor, without exception, but to begin from the end of the first lease, which was still subsisting.

After the first lease had ended, the lessee cut trees; and the reversioner brought an action of waste. The lessee pleaded "non dimisit;" upon which plea, the plaintiff had judgment. The defendant's points were, that the trees and their soil were severed from the manor by the exception of "woods" in the first lease, and that the grant of woods in the second lease, in effect, assigned them to the lessee himself, and therefore, they did not pass to him by the lease of the reversion. The Court held, that the woods and their soil were severed by the first lease, but that the severance lasted only so long as that lease; and that the reversion of the woods and soil remained in the lessor, and was well passed by the third lease, because the acceptance of that lease, by admitting the lessor's right to grant it, was an implied surrender of the second.

The meaning of the exception, in this case, seems to have been matter of construction and intention only; but Lord Coke takes the opportunity of laying down the law, that the soil itself may be demanded and recovered by the name of wood—meaning wood-land. Consistently with this, it is said, in Co. Lit. 4, b, that a grant of woods, "boscus," or "boscus crescentes," passes the soil.

3rd. As to the cutting of excepted Trees being Trespass, and not Waste.

This question may still be important, notwithstanding the

abolition of the action of waste, and of many subtle distinctions in pleading; because a right of re-entry, or of action for breach of covenant, is sometimes given upon the commission of waste, as in the case of *Goodright dem. Peters v. Vivian*, 1807 (8 East, 190), an ejectment, in Cornwall, for forfeiture, by cutting timber-trees, contrary to a proviso in the lease. It had excepted all trees of oak, ash, and elm, growing or to grow; with a proviso that if the lessee should commit waste, "in or upon the said demised premises," the lessor might re-enter. The defendant sold the wood of a coppice, including twenty or thirty standing trees of the descriptions excepted, some growing from old stools, and some being maiden trees. The full Court, upon argument, held that waste could only be committed of the thing demised, and that the trees, being excepted, were not demised, and that no forfeiture, within the provisions of the lease, could be incurred by felling them.

If, however, there be, in a lease, an exception of all trees and wood, with a covenant not to do any waste, spoil, or destruction, by cutting down, lopping, or topping the trees or the wood, with a power of re-entry on breach, the Court will try to construe the covenant as an engagement not to cut timber, simpliciter; notwithstanding the inaccuracy of the expression "commit waste by cutting timber," when the timber was really excepted from the lease, and therefore the cutting of it could not, strictly, be waste. See *Doe dem. Rogers v. Price*, 1849 (8 C. B. 894).

4th. As to what the Lessor may do on the Lands, if Woods or Trees be excepted.

Liford's Case, Stamp v. Clinton, reported by Coke (11 Co. 46, b, 12 Jac. I.), was an action of trespass by a lessee for life against the reversioner. The lease had excepted oaks, ashes, and elms of a certain age. The reversioner's agent came on the land to show some of these trees to an intended purchaser; and for this supposed trespass the action was brought.

The Court, in deciding against the plaintiff, laid down this proposition :—

“When the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and show the trees to those who would have them; for without sight none would buy, and without entry they could not see them.”

This principle has been very recently applied to the case of a reservation of trees in a demise not under seal, which was held to amount to a licence to cut them, to saw them up on the land, and to carry them away; *Hewitt v. Isham*, Bt. 1851 (7 Exch. 77). The reservation was in these words: “All the hedges, trees, thorn-bushes, fences, with the lop and top, are reserved to the landlord;” and the fact was, that the lessor had not only entered and cut the trees, but had dug saw-pits on the demised lands, for the purpose of sawing the timber; and this he was held justified in doing, if he did not leave the trees on the land for an unreasonable time; and he was allowed to plead “leave and licence” to an action of trespass. It was said, that if the demise had been by deed, the reservation would have been construed as a grant, and have implied the right of going on the land to cut and carry away the trees. For this there would, certainly, have been ample authority, not only in the maxim in law, “*Lex est, cuicumque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit*,” (11 Co. 52, a), but in the very words of Lord C. J. Hobart, in giving the judgment of the Court in *Lord Darcy v. Askwith*, 15 Jac. I. (Hob. 234), where he says, “If I grant or reserve woods, it implies a liberty to take and carry them away.”

In that case itself, the principle contained in these words was unsuccessfully attempted to be applied to a case of a lease of lands, woods, trees, and coal mines, for eighty years, in which the lessees, in the course of working the mines,

had cut timber-trees, and worked them up for use in the mines.

The complicated story called *Herlakenden's Case* (*Ivy v. Herlakenden*, 1589, 4 Co. 62, b), must be stated, with reference to separable interests in the land and the trees. An under-lessee was in possession of land under a general demise, which he thought had, necessarily, passed the trees to him, during his term. An apparent stranger entered, cut the trees, and carried them away. The under-lessee brought trespass against him. These facts appeared;—the Earl of Oxford (Vere) made a lease of the lands to three, as joint tenants, reserving the trees. One of the three assigned his share to a fourth person, by which the joint tenancy was severed. Then the Earl sold the trees to the three present owners of the lease, as joint tenants; so that they were lessees of the land, as tenants in common, as between two of them and the third, but owners of the trees, as joint tenants. Then they granted the under-lease, now vested in the plaintiff; then they sold the trees to Herlakenden, the defendant, and he cut them down.

If the under-lessee had seen his lessors' title, he would have known that their lease excepted the trees; but he saw it not, and supposed that it had passed the trees to them, and that they had passed them to him; and, now, the only point he could make, was, that the Earl's separate sale of the trees to the three owners of the lease had re-united them to the land. The Court answered—1st, That, if this were so, the trees must revert to the Earl at the end of the lease, which certainly was not intended; and, 2ndly, That the partial tenancy in common in the land could not be united with the joint tenancy in the trees: and, upon the whole, it was held, that the lessees had an absolute and divided property in the trees, so that, by the under-lease, of the land, they should not pass.

A curious result appears to follow an exception of the trees,

with a saving that the lessee shall take the shrowds and loppings of them. This saving has been held, in substance, to make the exception useless; for it gives the lessee a right to take the shrowds and loppings, either for use or for sale, throughout the term, and precludes the reversioner from cutting the bodies of the trees, until after the term ended. See *Tregmiell and Ux. v. Reeve* (Cro. Car. 437).

The right of the lessee to take loppings and shrowdings may, in some cases, be of practical importance to the validity of the lease itself. Thus, if there be a power to lease at the ancient and accustomed rents and reservations, and the existing lease at the time contain a simple reservation of "all timber-trees and trees likely to become timber," and then a lease be granted, under the power, reserving merely "all timber-trees, bodies of pollard and other trees whatsoever," it may be held that such words imply a right of lopping and shrowding, at least for repairs, and the right to the fruit and the shade of the trees; and thus the reversioner will be prevented from felling, and even from lopping, the trees, during the term; and the reservation, therefore, will not be such as was ancient and accustomed; and the lease will be void. Such a decision has, in fact, been recently made, in *Doe dem. Ward v. Lock*, K. B., 1835 (2 A. & E. 705).

Exception on sale

If there be exception on a sale, with right to remove within a limited time, the fact that the owner does not remove within the time, does not devote the property out of him, unless the clause is so drawn as to leave him the property therein only conditionally on his removing within the time.

Whether he can remove after and be of damage for his share on the land, or liable to such damage, was left open.

Ellis v. Hughes 1932 2 Ch 98 a note C.A

"without impeachment of waste" are the usual words, but that such case of course be addressed by one of other words. An estate has legally limited to twenty during the life of A without impeachment of waste: now tent to allow him to enter and receive rents and profits during his life or until alienation etc - but without as to him saying without impeachment - Held that he was entitled to proceeds of sale of timber cut by a contractor.
Re London & Greenwich 1923 1 Ch 500

CHAPTER II.

RIGHTS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

WITH regard to rights in trees, the tenant for life stands in much the same relation to the remainderman, as the lessee to the lessor; and most of the early life estates are treated as leases for life, which, in fact, they were, before limitations for life in settlements and wills had become (as they now are) much more frequent than leases for life.

Thus, a tenant for life is, generally speaking, entitled to act, with respect to timber and other trees, just as a lessee for years can, and not otherwise; and he is liable to be impeached (that is, complained of,) for waste, upon the same grounds as a lessee for years.

The difference, in practice, between the two cases, arises from the frequent exemption of the tenant for life from the consequences of waste, by expressly declaring his life estate to be "without impeachment of waste," "absque impetitione vasti;" a form of words which Lord Coke thinks to have been in use as long ago as the time of the statute of Marlebridge, in the 52nd Hen. III.

The effect of these words has been gradually extended, by construction, to relieve the tenant for life from both the common and statute law penalties of waste, and also to entitle him to convert the subject of waste to his own use and profit; but this extension was not made without opposition and doubt; and it may, obviously, be the means of much abuse of power. That abuse the Court of Chancery has attempted to restrain, and it has, from time to time, established rules for

such restraint ; and those rules amount, practically, to so considerable an exception from the meaning of the words, "without impeachment of waste," that it is impossible to understand what the rights of a tenant for life really are, with respect to timber and trees, without bearing in mind the equitable restraints imposed on the legal licence.

Thus, although a tenant for life, without impeachment of waste, might, legally, demolish all the dwelling-houses on the property, and convert their materials to his own use, without rebuilding any one of them, the Court of Chancery will restrain him from doing anything of the kind ; upon the principle that this would always be an unconscientious, and often a malicious, exercise of his legal powers ; and although he might, legally, cut down every stick of timber upon the estate, the Court of Chancery will prevent his cutting any trees planted or left standing for ornament or shelter, whether timber-trees or not, and any saplings or young trees not fit to be felled, and, in fact, from doing any other kind of waste which would be destruction. This jurisdiction has led to the use of the term "equitable waste," which denotes, partly, a kind of destruction which would not be waste at law, such as the cutting of trees which are not timber, if they have been planted or left standing for ornament, and, partly, that kind of legal waste which equity does not allow any expressed immunities to justify.

The same Court, however, also interferes, to restrain mere legal waste, either for the sake of giving prompt support to the legal right, in cases of urgency, or because some technical impediment prevents legal process being available ; and thus it is sometimes obliged to determine the legal questions, what is waste, or is not, and who may commit it, or not.

The effect to be given, in a court of law, to the words "without impeachment of waste," came in question, in the time of Queen Elizabeth, in *Sir Moyle Finch's Case*, the grandfather of Lord Chancellor Nottingham. His mother,

the daughter of Sir Thomas Moyle, and heiress of Eastwell, which she brought into the Finch family, was tenant for life, without impeachment of waste, with remainder to her son in fee. She cut timber—not for repairs—and her son claimed it, as part of the inheritance. The dispute was referred to Chief Justice Wray (Q. B.), and Chief Baron Manwood. They invoked the assistance of other Judges, and, eventually, they determined, that the exemption from impeachment of waste gave no property in the timber, and only relieved the tenant for life from the forfeiture of the place wasted and treble damages, under the statute of Gloucester, 6 Edw. I.

The law, upon this point, was, soon afterwards, "otherwise understood," as modern Judges express it.

In *Lewis Bowles's Case* (*Bowles v. Berrie*) in 1616 (11 Co. 79, b), this question was much discussed, among others. The property actually in dispute was only the timber of a barn, blown down, on the manor of Nortonbury, Herts, during the ownership of a widow, Mrs. Bowles, whose interest ended at her death. Much discussion arose as to whether her estate, when the barn fell, was that of tenant in tail, after possibility of issue extinct, or of tenant for life without impeachment of waste. It was finally held to be the latter, and it was decided, or assumed, that the right to the timber of the barn must be the same as if a timber-tree itself had been cut by a tenant for life without impeachment of waste, or had been blown down in his time. Then came the question, What were his rights, in such a case? The opinion of Wray and Manwood, in *Sir Moyle Finch's Case*, was now overruled, with "great reverence to them," as Lord Coke says, upon the suggestion, that it was not strictly a judicial decision, being upon an arbitrament and without argument; although, in *Herlakenden's Case* (*suprà*, p. 21), before Wray and the rest of his Court, it seemed to be approved. New grounds for a contrary determination now appeared. It was said that in *Walter Idle's Case*, in the Year Book of 3 Edw. III., 44, a, b, *settles law that t. for life without impeachment has the property in the timber when a tenant in tail is in possession*.

b. Thus he can keep damages for claims of riparian owners in a case of waste
under a power not requiring the lease to be made without impeachment, the waste being
made. *Re Lacon* 1911 2 Ch 17
And damages for waste goes in lease in his time *Re Barrington* 33 Ch D 257
Re Liddiard 1912 2 Ch 756

26

TREES AND WOODS.

*A person without impeachment of waste on any part of waste: would
only be the action, and not confer the property in the second line*
where a lessee was declared free from being "impeached or
impleaded" for waste, it had been held that these two words
were of different signification; "impleaded" relating only to
the forfeiture, and "impeached" relating to a demand of any
kind; and it was now said, that impeachment meant
"impetitus;" that that word meant demand of any kind—
including a demand for the property of the waste done—so
that a person who is without impeachment of waste is not
liable to any demand for the value of the waste committed,
and may, consequently, convert the produce of it to his
own use. *And this had been Balfour's own opinion though given a case
of 17 Hvi (otherwise unreported) to show that it was unimpeachable*

11 Chancery 826

The principle of equitable interference by injunction,
against the rights of a tenant of a "particular" estate, ex-
pressly declared to be without impeachment of waste, was
acted upon as early as *temp. Car. I.*, when the Common
Law Judges seem to have been consulted upon it. The
case is referred to by Lord Nottingham, in his note of
Skelton v. Skelton (see 2 Swanst. 171). It appears to have
been the case of a Bishop's lease for years, from the See of
Winchester, without impeachment of waste; and the lessee,
towards the end of his term, was about to "cut up" all the
trees on the lands demised; and thereupon an injunction out
of Chancery was awarded, by the advice of all the Judges, *pro*
bono publico, and in favour of the Church, whereof the King
is patron, notwithstanding the agreement of the parties.
This is probably the same case as *Bishop of Winchester v.*
Woolgar, 3 Swanst. 493, n.

Lady Evelyn's Case in 1670 (1 Dec., 22 Car. II.), *Evelyn v.*
Evelyn, 2 Swanst. 172, n.) is attributed by Lord Nottingham to
a similar equitable right of interference with legal powers, and
is described, by him, as showing, that he who has a power to
commit waste, may, sometimes, be restrained from the exercise
of that power, when it tends only to a private damage (see 2
Swanst. 172, in *Skelton v. Skelton*), although Lord Hardwicke,
in *Garth v. Cotton*, attributes it rather to the principle of

A grant that grantee may do waste, gives him the property of the land until he dies without issue. If he dies without issue, the land goes to his heirs. If he dies with issue, the land goes to his issue.

RIGHTS BETWEEN TENANT FOR LIFE AND REMAINDERMAN. 27

equitable restraint of a premature exercise of legal powers. It was a case in which Lady Evelyn was tenant for life, in jointure, in possession, with remainder to her son, Sir John Evelyn, for life, without impeachment of waste, with remainder over; and Lady Evelyn had let the land to a tenant-at-will, by whose permission Sir John entered, and cut trees, probably timber. Lord Keeper Bridgeman awarded an injunction against him during the life of the jointress, upon the ground (as stated by Lord Nottingham) that "although no injunction had lain against Sir John Evelyn, if his remainder had fallen into possession, and although the licence of the tenant-at-will to enter excused the entry from being a trespass, yet, no possession by such entry can enable him to cut down the trees presently, for the jointress hath right during her life to the shade and the mast, and to reasonable booties."

Skelton v. Skelton, in 1677 (2 Swanst. 170, n.), was not a case of equitable waste; but it shows Lord Nottingham's view, that the Court of Chancery would interfere with a right to do legal waste, if necessary, pro bono publico, or "sometimes," if the act "tends only to a private damage." It was the case of a jointress in tail, within the statute of Hen. VII., and, therefore, not competent to bar the entail; but, still, Lord Nottingham thought she had, probably, a legal right to do waste; and as no special grounds for equitable interference appeared, he declined to restrain her. It does not appear whether or not she had issue inheritable under the entail.

In *Abraham v. Bubb*, before the same Judge, in 1679 and 1680, and reported in several books (2 Shower, 69, 2 Freeman, 53, 2 Eq. Ca. Ab. 757, 2 Swanst. 172, note, from Lord Nottingham's MSS.), the interest of the person sought to be restrained from waste was much the same as in *Skelton v. Skelton*, for she was (or was treated as being) a married woman, tenant in tail, after possibility, by provision of a

former husband; unless it be the fact that, in *Skelton v. Skelton*, there was issue in tail. Lord Nottingham seems to have thought the two cases distinguishable. The injunction was sought against waste generally. On the property, there was a house, with trees about it. The defendants demurred to the bill; but Lord Nottingham ordered them "presently to answer, quoad the house and trees about it, pro bono publico;" and then, the next morning, as his MS. note tells us, he ordered them to answer the whole bill . . . "upon the reason of the case, *Skelton v. Skelton*, because tenant after possibility has only *impunitatem*, not *jus in arboribus*; for he in reversion may have a trover, when they are felled." He then tells us that, on a subsequent occasion, "the importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way, that trees marked out by the ancestor for payment of his debts might be felled: yet I continued in the same opinion, that where he in the reversion might have a trover for the trees, when felled, there, the Court ought to grant an injunction to stay the felling; and that I took to be this case; . . . but hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought, for felling some oaks, which shall be admitted to be cut, and, as the law shall be judged in a trover, accordingly, to grant or deny a perpetual injunction, and, in the meantime, to stay waste."

From this case, it appears, that Lord Nottingham thought it clear, that even if a tenant in tail, after possibility of issue extinct, had a legal right to commit waste and to convert it to his own use, yet, still, he would be restrained in equity from "defacing the seat," by destroying "the house and the trees about it," or, in modern phrase, from committing equitable waste. We shall, hereafter, see that the present doctrine, after some doubt, is, that tenant in tail, after possibility, may commit legal waste, but not equitable waste. Lord Eldon's

opinions, upon both points, seem to have been the same as Lord Nottingham's; see *Williams v. Williams* (15 Ves. 419, 12 East, 213, 3 Mad. 519).

In *Williams v. Day*, 1680 (2 Ch. Cas. 32), Lord Nottingham again declared he would stop pulling down houses, or "defacing a seat," by tenant in tail after possibility of issue extinct, or by tenant for life, though dispunishable of waste by express grant, or by trust.

In the case of *Cookes v. Whateley*, otherwise *Cooke v. Whaley*, otherwise *Cooke v. Winford* (1 Eq. Ca. Ab. 221 & 400, 3 Mad. 529), before Lord Keeper Somers, 1701, a general injunction to restrain waste was asked against a jointress, tenant in tail after possibility; but it was granted only to restrain "wilful wastes in any of the houses"; and in an Anonymous Case before Sir John Trevor, M. R., 1704 (2 Freem. 278), a similar injunction was awarded.

It was not until after these decisions, that there occurred the *Raby Castle Case*, *Vane v. Lord Barnard*, before Lord Cowper, in 1716-17 (2 Vern. 738, Pre. Cha. 454, and see Eden on Injunctions, 178, n.), where a father, tenant for life, without impeachment of waste, was pulling Raby Castle to pieces, out of spite towards his son, who was tenant for life in remainder. He was not only stopped by injunction, but also ordered to repair the damage done; and this obligation was enforced against his assets, upon his dying before the Castle was restored. See 2 Eq. Ca. Ab. 759, *per* Lord Hardwicke.

Mr. Jacob has printed (Jac. Rep. 71) a note from Reg. Lib. of a case of *Lawley v. Lawley*, 1717, which related to equitable waste. The injunction, there awarded, restrained the cutting of any trees "which were for the ornament or shelter of the said capital messuage;" and, afterwards, a commission went, by consent, to determine which of the trees were proper to be cut down, and which to be preserved for the ornament or shelter of the house; and, on the return of the commission, the

injunction was continued, during the defendant's life, as to the trees certified not to be fit for cutting.

It seems, from this language, that, in those days, the protection extended to trees which were, in fact, ornamental, and not merely to those planted or left standing for ornament. In *Sir Herbert Packington's Case* (now spelt Pakington), in 1744, before Lord Hardwicke (3 Atk. 215 ; and 7 Bac. Ab. 291, Gwill.), a father was tenant for life of the Westwood Estate, with remainder to his son in tail, and the bill was filed by the son against the agent of the father, who was abroad, to restrain the cutting of trees in the park, which were either an ornament or shelter to the house ; and the son put in evidence a letter from his father [probably to himself] written three years before, in which he said, that if the son would not consent to cut off the entail, he would give orders for cutting down all the ornamental timber-trees. The principal objection taken to the plaintiff's claim seems to have been, that the trees most in danger grew in a wood [in the park] and had arisen naturally, and by accident, and not from planting. Lord Hardwicke said, that whether they grew naturally or were planted, if they served as an ornament or shelter, it amounted to the same thing, and it was very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods ; and he could mention two of his own acquaintance, Hampstead, a seat of Lord Craven's, and another in Essex. Upon the general question, he observed, that the Court had not only restrained tenants for life without impeachment of waste, from cutting down timber, either for ornament or shelter of the house, but had gone further still, in the case of *Charleton v. Charleton*, in extending it to the case of a park ; that there was, indeed, a difference of opinion [qu. : in that case ?] between Lord Chancellor King and the Master of the Rolls, but only in part, for Lord King continued the injunction as to trees for ornament or shelter, but dissolved it as to straggling trees.

The terms of the injunction then granted, as given in 7 Bac. Ab. from Reg. Lib., went to restrain cutting "timber-trees growing in the park, which were for the shelter or ornament of the mansion-house there, and also any timber-trees which were planted or grew in any lines, avenues, or ridings, for the ornament of the said park, until the said Sir H. Packington should fully answer the plaintiff's bill."

In the first of the two cases of *Aston v. Aston*, before Lord Hardwicke (see 1 Ves. Sen. 263), in June, 1749, the principles of the Court of Chancery, restricting the power of a tenant for life without impeachment of waste, are reviewed, and are put upon the ground of liability of the power to be used against conscience, and unreasonably; as, for instance, to the destruction of the thing settled, which was said to be the ground of *Lord Barnard's Case*; but the precise facts of this first case of *Aston v. Aston*, seem not to be a precedent for future decision. The full decree is in Mr. Belt's Supplement, p. 134. The jointure there mentioned, was probably the same as that mentioned in the *second* case of *Aston v. Aston* (1 Ves. Sen. 396): and, if so, the jointress was tenant for life, without impeachment of waste, *except* in pulling down houses and felling timber.

The case of *O'Brien v. O'Brien*, before Lord Hardwicke, in 1751, is frequently referred to, for the terms of the injunction; but it does not appear to have undergone any adverse discussion. The order made was, for an injunction to stay the cutting down of any timber-trees or other trees growing on the estate of Blatherwicke, in Northamptonshire, which were planted or growing there for ornament or shelter of the mansion-house, or that grew in vistas, planted walks, or lines, for the ornament of the park, part of the premises in question; and also, from cutting down any saplings, growing on any other part of the estate in question, not proper to be felled, until answer or further order (see Ambler, 107,

referring to Reg. Lib., B. 1750, fol. 264; and see also, 1 B. C. C. 168, n.).

We come then to Lord Thurlow's great case of *Equitable Waste*,—*Chamberlayne v. Dummer* (1 B. C. C. 165; 3 *ib.* 549); and although the reports of it end in a direction for the trial of issues, the terms of the interlocutory injunction granted in it have been a precedent in use for seventy or eighty years. The testator, Thomas Dummer, had estates at three places in Hampshire, viz., Cranbury, Wolston, and Baddesley, with a house and plantations on each; and being in the habit of living upon two of them, he devised them all to his wife, for life, with remainder to Elizabeth Holland for life, with remainder to the plaintiff Chamberlayne, in fee. By a codicil, he expressed a wish thus:—"It is my request that my dear wife should keep up and occupy my several mansion-houses, &c., in the county of Southampton, in such manner as we have hitherto done." And in another codicil, after noticing that his wife had no power to cut down any timber, he gave to her, for so long time as she should continue his widow, full power and authority to cut timber upon any part of his estate, for her own use and benefit, at all seasonable times of the year. He died in June, 1781, and his widow soon marked 12,000*l.* worth of timber for cutting, and cut a great deal of it. Among this, were trees planted or left standing for ornament or shelter, and saplings unfit to be cut. Upon a bill, by Chamberlayne, for an injunction, it was argued, before Lord Thurlow, in 1782, that the widow's only right was to cut timber wanted for use on the estates; but he rejected this construction of the codicil, and held that she might cut timber generally, and advised the parties to agree as to what she should properly cut; but before any agreement was made, she put in an answer, admitting that she had cut trees in the lawns and pleasure-grounds at Cranbury, but for the purpose of widening the way to the house, to prevent damps, and to improve the

place—and that she had cut trees placed in rows at Wolston and Baddesley, but they were such as she did not consider ornamental; and that oaks, ashes, and elms of certain sizes, which she specified, were esteemed timber, and that she had cut none under those sizes. Upon this, Lord Thurlow awarded an injunction to restrain “the defendant, her servants, workmen, and agents, from cutting down any timber and other trees growing on the estates in question, which were planted or growing there for the protection or shelter of the several mansion-houses belonging to the said estates, or for the ornament of the said houses, or which grow in lines, walks, vistas, or otherwise, for the ornament of the said houses, or of the gardens, or parks, or pleasure-grounds thereunto belonging, and from cutting down any timber or other trees, except at seasonable times, and in a husbandlike manner, and from cutting down saplings and young trees not fit to be cut as and for the purposes of timber, until the hearing of the cause, or the further order of the Court.”

The cause then proceeded, and came to a hearing in Hilary Term, 1785; but, in the meantime, the widow had married Mr. Dance, who was made a defendant. Upon this marriage, the power of cutting timber had ceased; so that the only question was one of account, for the cuttings past. The whole question of the extent of the widow's rights under the terms of the codicil was re-argued, at great length. Lord Thurlow took time to consider; observing that the right was of as loose a form as any known, and that every diligence should be applied by the Court to direct the inquiries in such a way as to give the least possible expense and difficulty to the parties; and he desired to be furnished with copies of former decrees and injunctions, in cases of waste. No judgment was given, until seven years afterwards, when this case was one of those in which Lord Thurlow sent written directions to the Registrar's Office, on the 24th of May, 1792, shortly before his finally giving up the Great Seal. By these direc-

tions, it was ordered, that there should be a trial at law, upon the issue, whether Mrs. Dance had cut any timber or other trees, which had been placed or designedly left, for the ornament or shelter of the mansion-house, gardens, and pleasure grounds at Cranbury and at Wolston, and also whether she had cut any saplings or young trees down, which were not proper to be felled as timber; and what damage had been sustained thereby; and the plaintiff was to be plaintiff at law, and the defendants, Dance and wife, to be defendants at law; and the consideration of costs and further directions were reserved till after the trial.

It does not appear whether any further proceedings were taken in this case. The direction for an issue, instead of an inquiry before the Master, founded upon the admissions in Mrs. Dance's answer, was, probably, given for the sake of *vivâ voce* evidence on the questions arising, particularly as to the saplings, and as to the "damage sustained" by the cutting of them and of the ornamental timber; but it is believed that the amount of damage sustained has not been made the subject of inquiry in subsequent cases; and that the wrongdoer, in equitable waste, has been made answerable for its value only, if the mischief has not been already prevented by injunction. It is obvious, that it may be extremely difficult to fix upon the amount of damage sustained by a destruction of ornamental trees, the loss of which may destroy all the beauty of a place.

To what extent the late statute of 1858 (21 & 22 Vict. c. 27), empowering the Court of Chancery to give damages in injunction cases, will be applicable to waste in trees, is at present uncertain.

The expression "planted or left standing" ("*designedly*" seems a superfluous word), for the ornament of a house, garden, or pleasure-grounds, has been adopted in a great many subsequent cases; but, in a recent instance, a happier form of words was used, namely, "planted or left standing for

ornament *with reference to the "occupation"* of the house ; see *Turner v. Wright*, 1860 (Johnson, 753).

Towards the end of Lord Mansfield's judicial life, an attempt was made, in the case of *Pyne v. Dor*, in 1785 (1 T. R. 55), to induce the Court of King's Bench to adopt equitable views of the rights of a tenant for life, without impeachment of waste ; and his lordship expressed his willingness to do so, if necessary ; but the plaintiff proved nothing more than great destruction of timber, without showing that it was planted or left standing for ornament or shelter ; and thus his case failed.

In the very first days of Lord Eldon's Chancellorship (May, 1801), there came before him the case of the *Marquis of Downshire v. Lady Sandys* (6 Ves. 107). There, the Ombersley Court estate, in Worcestershire, had been settled by Edwin Lord Sandys (then lately dead), upon his wife, the defendant, for life, without impeachment of waste, with remainder to trustees to preserve, with remainder to trustees for a term, to raise money, with remainder, subject to the term, to Lord Downshire (who had married the settlor's niece), for his life, without impeachment of waste, after the money should have been raised, with remainder to Lady Downshire, for life, in like manner, with remainder to Lord Hillsborough, an infant (Lord Downshire's eldest son), for his life, without impeachment of waste, with remainder to his first and other sons in tail, with remainders over.

The trusts of the term for raising money were thought to throw some light on Lady Sandys's powers. Those trusts, although, not arising till after her death, were,—to discharge mortgages, and to pay 3000*l.* to her executors ; and it was declared, that until these sums should be paid, the trustees might, after her death, cut such timber and other trees as should be wanted for building, and for certain other purposes stated, and also cut and sell any timber or other trees, provided that the falls were made in due course, and at proper

times of the year, and so as not to injure the beauty of the house called Ombersley Court.

Upon this devise, an injunction had been issued against Lady Sandys, in November, 1799, forbidding her to cut any trees or timber standing or growing for ornament or shelter of Ombersley Court, or any other houses or buildings on the settled estates, or which grew for ornament in any of the vistas, avenues, walks, pleasure-grounds, or plantations belonging to Ombersley Court, or to any part of the late lord's estates, settled on the plaintiffs, and from cutting saplings not proper to be felled.

The application to Lord Eldon was for a sequestration against Lady Sandys, for a breach of this injunction, by cutting fir-trees on a part of the settled estate called Lineal Common, at an admitted distance of two miles from the house, but sworn to have been planted with order and regularity, in rows and clumps, for ornament to the common, and to be, in fact, ornamental to it and to the surrounding country, from their high situation, and the manner in which they were planted.

In answer to this, it was said that the common could not be seen from the house or its grounds, and that it was separated from them by land of other persons, and that although the trees were in clumps and rows, none of them were planted in vistas, avenues, or walks. The affidavits in reply, however, insisted, that the common might be seen from many parts of the grounds, and that parts of the settled estates were contiguous to it.

Lord Eldon said that if the injunction went beyond previous terms, or the reach of the principle, which he thought it did not,* the proper course would have been to apply to alter its terms, and not to risk disobedience to it; and that the dry question was, Whether the injunction prohibited

* 6 Ves. 109.

cutting the trees upon Lineal Common? He expressed his opinion, that it would embrace trees planted on the common, as part of the estate; and he then added, probably to prevent more litigation, that the injunction ought to go thus far, to prevent disappointing the views of the author of the ornament of the estate; that it was impossible that a principle, for general application, can depend upon the circumstance whether a little slip of land connects the estate with the common, or is interposed between them; or whether the common is in sight. "Suppose," said he, "it is situated on a different side of a hill from the house; if the system of plantation for the ornament of the estate embraced the whole circuit of the hill, will it be said that it is not to be protected, because it is on the other side of the hill? So, if it is at the distance of two miles, it is a very material circumstance upon the question of the fact, whether it was planted for ornament or not; but if it could be seen from the grounds, or if it was the ride of the family for pleasure, that is evidence that it was planted for ornament; and the distance is only a circumstance of fact, material, as evidence, to decide the fact, whether the trees are growing for ornament or not." He had, before, said, that if a testator or settlor had gratified his own taste in planting for ornament, in the manner most disgusting to the tenant for life, and the most agreeable to the tenant in tail,—yet his taste, like his will, binds them: and the question, which is the most fit method of clothing an estate with timber, for the purpose of ornament, cannot be trusted to the Court: that the principle had been extended, from ornament of the house, to out-houses and grounds, then to plantations, vistas, avenues, to all the rides about the estate for ten miles round. He concluded by saying, that the value of the trees must be accounted for by the defendant; or the sequestration must go.

Lady Sandys then applied to alter the terms of the injunction, upon the ground that the settlor, by expressly restrain-

ing the trustees of the term from felling trees so as to injure the beauty of the house, implied that neither she nor they would be punishable for injuring the beauty of the estate, as distinguished from the house. The trustees' term was, probably, without impeachment of waste; but this is not expressly said.

Lord Eldon refused the application, denying that it was a necessary inference that one party shall have a power to-day, because another party will have a power to-morrow. He added these general observations:—"It is not to be denied that the terms 'without impeachment of waste,' as applied to trustees of a term for special purposes, have a very different sense from that of the same words annexed to a tenancy for life; and, in an ordinary case, I do not apprehend the Court would have permitted the trustees to execute their trust by cutting timber, merely because they were trustees without impeachment of waste, though they might at law. This Court would say that, having a discretion, they must act in their trust as the Court itself would act."

In *Wombwell v. Lady Charlotte Belasyse*, in 1825, of which a report of a judgment of Lord Eldon's, on two days (April 22nd and 23rd), is given, from a short-hand writer's note, in the second edition of the 6th Vesey (p. 110, a), the Vice-Chancellor had directed an issue to try whether certain trees in a wood, called Prestwood, part of the Newburgh estate, in Yorkshire, were planted or left standing for ornament to the mansion-house, park, or grounds; and he seems to have restrained cutting in the meantime. Upon appeal from this order, Lord Eldon (April 22nd) said, "The doctrine of the Court is extremely well settled. If the object in planting timber, or in leaving timber standing, is ornament, whether the effect is truly ornamental or the most absurd exhibition that ever was produced, this Court will protect that timber; and the protection is not confined to trees planted or left standing as ornamental to a house or park,

nor does it depend upon the distance from the mansion ; but I do not recollect that it has gone to this extent, that if a ride is made through a wood, in which wood the proprietor has been in the habit of cutting timber for the use and repair of the mansion, that ride shall protect the whole wood from being cut Neither do I recollect any issue ever directed on this ; and in directing an issue, attention must be had to the interests of all parties ; that if the injunction restrains the legal right to cut timber, security shall be given that, in case of the death of him, whose enjoyment of that legal right may have been restrained improperly, his estate shall, to the extent of the benefit he would have derived from the exercise of that right, be reimbursed by those who restrained him In framing the issue, another thing also must be attended to ;—by whom the trees were planted or left standing for ornament ; as, if they had been planted by tenant for life without impeachment of waste, unless afterwards left standing, with that view, by some person having the inheritance, they would not be entitled to this protection.”

On the next day, Lord Eldon said :—“ The question is not, whether the timber is or is not ornamental ; but the fact to be determined is, that it was planted for ornament, or, if not originally planted for ornament, was, as we express it, left standing for ornament, by some person having the absolute power of disposition. If such a proprietor had even the bad taste to plant or leave standing a couple of yew trees, cut in the shape of peacocks, on the road side, I do not shrink from what I laid down in the *Marquis of Downshire v. Lady Sandys*, that they must be protected, until some person, having the same absolute power of disposition, with more correct taste, comes into possession ; and this doctrine applies, in the same manner, to a pleasant ride, although at a distance of two miles from the mansion house ; but I do not agree that a mere tenant for life coming into possession, can vary the estate. That can be done only by some person having

the absolute dominion over it. A farther subject of consideration is, how far this protection can be applied to an avenue or ride through a wood, which had previously supplied timber for the purpose both of repairs and sale; how far the act of making that wood is to be considered as a consecration of the wood to this purpose of ornament The acts of the owner, who made those rides, will be extremely material; as, if that owner, after those rides were made, had been in the habit of cutting in that wood, for the purpose of repairs and sale, it cannot be represented as his intention that, not a sufficient part, but the whole wood, should be consecrated to that purpose of ornament, so that a Court of Equity must say it shall stand until it shall be entirely decayed. Let the plaintiff go before the Master, and give such security as will, in the Master's judgment, secure to the defendants the value of all the trees which the defendants shall be prevented from cutting by the injunction of this Court, in case it shall finally turn out, in the judgment of this Court, that they ought not to have been enjoined in equity; and let the Master proceed *de die in diem*. Declare that, in the issue hereinafter directed, it is intended by this Court that the jury shall try and determine, not whether the timber in question, or any part of it, is ornamental, but whether the timber in Prestwood, or any part thereof, ornamental or not, was planted or left standing for ornament, or the purpose of shelter, by any former owner of the estate: 2ndly, whether, consistently with the purposes for which such trees were planted or left standing, if planted or left standing for ornament or shelter, any and what part thereof may be cut for the purposes of repairs or sale; and let the jury, in case they shall find that such wood or any part thereof was planted or left standing for ornament or shelter by any former owner, indorse upon the *postea* what estate and interest in the lands such former owner had.

"I do not confine the directions to the mansion-house;

declaring my opinion, that, consistently with this doctrine, which I admit has taken great liberties with the rights of mankind, I must abide by what has been laid down in such cases; and, therefore, not only the mansion-house, but these rides, and shelter to the park also, must be protected."

There is a short note of a case of *Halliwell v. Phillips*, in 1858 (6 W. R. 408), in which Vice-Chancellor Wood seems to have thought that the case of *Wombwell v. Belasyse* justified his directing an inquiry whether any and which of certain trees "can properly be cut, regard being had to the purpose of ornament, for which they were originally planted or left standing;" but, in the more recent and much considered case of *Ford v. Tynte*, before the Lords Justices, in 1864 (12 W. R. 613), their Lordships intimated that in *Halliwell v. Phillips*, the principle of *Wombwell v. Belasyse* had been carried further than it was intended to go; and they directed an inquiry in these terms: viz., "Whether certain woods and other particular trees, which had been marked for cutting, or any and which of them, were or was, or have or has been, planted or left standing, by any owner in fee or in tail, of the Halswell Estate, or any part thereof, for the ornament or shelter of the mansion-house on the said estate, or of the gardens, park, or pleasure-grounds thereto belonging, or of any road or roads, path or paths, leading thereto, or for the purpose of intercepting the view of any object or objects intended to be kept out of sight from the said mansion-house, gardens and park, or pleasure-grounds, or any part thereof; and in case it shall be so found as to the said woods, or any or either of them, then that further inquiry should be made, whether the trees therein have, ordinarily, or otherwise, and under what circumstances, been cut for repairs, or for sale; and what estate or interest the person or persons, by whom, or by whose order or direction the same were so cut, had in the said Halswell Estate, at the time of the cutting thereof; and whether the trees in the said woods,

and the said other trees which have been marked for cutting, or any or either and which of such trees, injure or impede the growth of any other trees adjoining or near thereto, which are of so much importance to the purposes of ornament or shelter to the said mansion-house, gardens, park, or pleasure-ground, as that the removal of the trees so marked for cutting is essential to such purposes of ornament or shelter."

Lord Eldon's judgments in *Downshire v. Sandys*, and in *Wombwell v. Belasyse*, seem, certainly, to show his opinion, that the equitable protection, to trees planted or left standing for ornament, ought to be extended to them wherever they were, and without reference to their connection with a house; but the modern decisions have taken a contrary turn; particularly, as will be hereafter seen, in a case of *Micklethwait v. Micklethwait*, where the Lords Justices, differing from Vice-Chancellor Wood, held that trees planted or left standing for ornament to an estate, upon which stood one of two family houses, were not to be protected in favour of remaindermen claiming under a will made after that house had been abandoned for the other, and pulled down.

In the meantime, it will be proper just to notice two other cases before Lord Eldon, of about the same date as *Downshire v. Sandys*.

Lord Tamworth v. Ferrers, which occurred in the year 1801, and is stated in 6 Vesey (419), was compromised, and seems to have been reported merely for the sake of the terms of the order for an injunction against equitable waste, which were copied from *Chamberlayne v. Dummer*.

Davis v. Leo, in 1802 (6 Ves. 784), in which the facts were not thought sufficient for an injunction, is material only as containing a dictum of Lord Eldon, that a tenant for life might have an injunction, particularly as to ornamental timber; for that that was not so much upon his interest, as his enjoyment.

In *Wellesley v. Wellesley* (6 Sim. 497), Mr. Long Wellesley was tenant for life, without impeachment of waste, with remainder to his first and other sons in tail, of the Essex estates, including Wanstead House and Park, under the settlement made upon his marriage with his deceased wife, Miss Tylney Long. The settlement authorised the pulling down of Wanstead House (with certain consents) and the sale of the materials for the purpose of paying off incumbrances. The house had, accordingly, been pulled down. The settlement authorised, also, the granting of building leases, on any part or parts of the estates. Some villas had been built, outside the park, probably under the powers of leasing given by the settlement. There were standing, in the park, great numbers of trees, not timber, but horse-chestnuts, sycamores and limes, which had been planted or left standing for ornament or shelter to the park and pleasure-grounds, and which were, in fact, ornamental to the villas outside the park, and it seemed very desirable that they should be left standing, for the purpose of increasing the probable value of the park and adjoining lands, for building purposes and otherwise; and it was suggested that the tenant in tail might wish to rebuild the house. In the year 1828, Mr. Wellesley began to cut these trees down. He was stopped by an injunction at the suit of his eldest son, then an infant. This injunction was granted *ex parte*, by the Vice-Chancellor, (Sir L. Shadwell); and a motion to dissolve it was afterwards very fully argued before the Lord Chancellor Lyndhurst, who, upon leaving office, in the year 1830, made an order, simply refusing the motion before him, and thus upholding the injunction; but without giving any reason.

The bill, in the cause, sought both an injunction against further equitable waste, and an account of that committed. The cause came to a hearing in the year 1834, before the Vice-Chancellor, and was fully argued. As regarded the injunction, he treated it as a matter of course to make it

perpetual, after the order which Lord Lyndhurst had made ; and, with respect to the account, he directed it to be taken, and the produce of the waste to be brought into Court, and treated as part of the settled property ; except that Mr. Wellesley, the tenant for life, was not to take any benefit from it. The eldest son was then within a few months of coming of age ; and it is probable that, upon that event, he applied for and obtained payment of the fund ; for it would seem that he would have been entitled to it, as of course, under the terms of the Vice-Chancellor's decree. No further litigation appears in the books on the subject of this particular waste ; but the question has been much discussed, whether the case is an authority for the proposition, that trees planted or left standing for the ornament or shelter of a house in a park, or of a park as connected with a house, will be protected against equitable waste, after the house is removed, or has ceased to be occupied by the family, or any of its members ; and when there is no intention of re-building it, or of restoring it to its former uses. The views taken of the case, by subsequent Judges, seem to show that it cannot be considered an authority for this purpose ; and that the injunction is a precedent so far only as it protected the trees, as planted or left standing for ornament or shelter to the existing villas, or because there was a chance of Wanstead House being rebuilt on a smaller scale. See Lord Justice Turner's observations (1 D. & J. 523).

In *Morris v. Morris*, in the year 1847 (15 Sim. 505), before Sir L. Shadwell, and afterwards before Lord Cottenham on appeal (11 Jur. 196), a tenant for life in remainder, without impeachment of waste, was allowed to sustain a bill for an injunction against the preceding tenant for life and his trustee for life (also without impeachment of waste), to restrain equitable waste in the cutting of trees planted or left standing for ornament to a house which had been abandoned by the settlor, and afterwards pulled

down by the tenant for life, wrongfully, as the Lord Chancellor thought, although the bill did not complain of that act.

In *Micklethwait v. Micklethwait*, in 1857 (5 W. R. 640 & 861, 1 De Gex & Jones, 504, 524), a testator was the owner of two estates in Norfolk, called the Beeston estate, and the Taverham estate. The Beeston estate was much the smaller of the two ; but upon both of them there was a family house. The testator lived at Beeston many years, but afterwards ceased to do so, and lived wholly at Taverham. The Beeston house was abandoned by him before the date of his will. It became dilapidated, and he pulled it down. There were, at Beeston, an avenue, and other trees, which had been planted or left standing for ornament. By the testator's will, in the events which happened, both the Beeston and the Taverham estates became vested in a tenant for life, without impeachment of waste, with remainder over. The tenant for life began to cut down the avenue at Beeston ; upon which, the remainderman brought an injunction bill to restrain him. An order was made, *ex parte*, for an injunction to restrain cutting trees in the avenue, or in either of the parks forming part of the Beeston estate. This injunction was afterwards continued, by Vice-Chancellor Wood, upon argument ; and it was extended to restrain the cutting any trees forming either side of the avenue on the Beeston estate, or any other trees planted or left standing for ornament upon any part of the Beeston estate, until further order—and it was referred to Mr. T. J. Clark, a land agent and surveyor, to inquire and certify what trees had been planted or left standing for ornament on that estate, and whether any and which of them were proper to be cut, having regard to the purpose for which they were planted or left standing.

An appeal, from this order, having been brought before the Lords Justices, an arrangement was made for hearing the

cause, on motion for decree, before their Lordships, who held that, inasmuch as the house had ceased to exist before the testator's death, neither the avenue, nor any other trees planted or left standing for ornament was, or were, entitled to protection.

The Lord Justice Knight Bruce, after alluding to *Lord Downshire v. Lady Sandys*, expressed himself thus:—“Perhaps a state of circumstances may be imagined, in which timber would, in the absence of any express direction in a will or any instrument governing the title, be protected, as ornamental, without reference to any former, or present, or intended, residence or house, and independently, altogether, of any such consideration. But of this I am not sure. I am, however, satisfied, that there is no such state of circumstances here; and as, in my judgment, I repeat, the testator, under whom alone all the litigants before us claim, did not, in or after the demolition of the Beeston house, which demolition preceded by some years the will, contemplate or intend, that, in his lifetime, or after his death, there should or would, again, be a gentleman's residence at Beeston, I believe the suit to be, as to the timber, if not unexampled, at least not warranted by any example that binds us, nor supported by the principle on which, with a view to prevent the malicious or fraudulent use, or the abuse, of a legal power, the Court of Chancery, as a Court of Equity, has interfered, to restrain a right conceded, by the courts of law, to a proprietor having less than an absolute interest. It can seldom be right, I agree, to consider the extent of a rule as being only that of the examples of it; but there must, probably, be surer and more dangerous error, in stretching a rule beyond the reason for it. That is what the plaintiff, I think, seeks to do here, in opposition to the maxim, which, as sound as it is familiar, says, ‘*Nulla juris ratio, aut æquitatis benignitas, patitur, ut, quæ, salubriter, pro utilitate hominum, introducuntur, ea, nos, duriore*

interpretatione contra ipsorum commodum, producamus ad severitatem.'"

The Lord Justice Turner said, "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it, so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." "If, on the other hand, the devisor or settlor himself pulls down the mansion-house, upon what ground is it to be presumed that he intended that which is incident to the mansion-house to be preserved? Is it to be presumed that he meant that the incident should be preserved, when he himself has destroyed the principal?" "These trees are assumed to have been planted for ornament to the mansion-house. Are they to be preserved for ornament to the estate, when the mansion-house is pulled down? Are trees which are planted for one purpose, to be protected for another?"

It seems that, in the case of *Lord Mahon* against *Earl Stanhope* (his father), before Sir William Grant, Master of the Rolls, on the 9th March, 1808, of which a note is printed by Mr. Maddock, in the 3rd Vol. of his Reports (p. 523, n.), some trees, planted or left standing for ornament, had been cut down by the tenant for life, for the purpose of producing uniformity and consistency, "instead of an unpleasant and disjointed appearance," where gaps had been made by a tempest in a piece of ornamental planting: and this was held not to be equitable waste.

In *Day v. Merry*, before Sir William Grant, in 1810 (16 Ves. 375), he seems to have granted an injunction to restrain the cutting of trees planted for the purpose of excluding objects from view. No counsel appeared to oppose the appli-

cation, and no authority was cited for it ; but it was suggested to the Court that it was within the principle of equitable waste in ornamental timber. See the Order in *Seton* on Decrees, tit. "Injunctions ;" see also *Campbell v. Allgood*, 1853 (17 Beav. 623), and *Ford v. Tynte*, *suprà*. *ant h 41*

In *Smythe v. Smythe*, before Lord Eldon, in 1818 (2 Swanst. 251), the practical question was, whether a tenant for life, not impeachable of legal waste, was doing equitable waste, by cutting oak-trees, of which the contents were less than nine cubical feet, which were said to be unfit for timber, and the removal of which would be ruinous to the saplings left. Lord Eldon refused the injunction ; and Mr. Swanston's report of his judgment gives a lucid statement of doctrine, on the subject of restraining premature cutting of timber. It is this :—"A tenant for life, without impeachment of waste, is, clearly, not compellable to cut timber in such a way as a tenant in fee would think most advantageous ; but is entitled to cut down anything that is timber. This motion requires an affidavit, pledging the deponent that the trees about to be cut are not fit for timber. It is settled, that a tree, which a tenant in fee, acting in a husband-like manner, would not cut, may be cut by a tenant for life, unimpeachable of waste, provided that it is fit for the purpose of timber. A tenant for life, unimpeachable of waste, might cut down all these trees, without question, at law ; and to subject him, in this Court, to the rules which a tenant in fee might observe, for the purpose of husband-like cultivation, would deprive him of almost all his legal rights. If the trees are so far advanced as to become timber, the tenant may cut them down, though they are in a state to thrive, and though cutting them down would injure the saplings. It is not sufficient to state that this is thriving wood ; it must be thriving wood not fit for the purposes of timber. I cannot determine whether a tree, measuring less than nine cubic feet, is or is not fit for purposes of timber. If the plaintiff files an affidavit stating that

trees measuring less than nine cubic feet are not fit for purposes of timber, that must be met. In the cases referred to, the injunction restrained the tenant for life from cutting trees unfit to be cut *as timber*."

Although, in *Garth v. Cotton*, Lord Hardwicke thought, that an exception of voluntary waste, out of a limitation without impeachment of waste, was, in fact, an absolute restriction against cutting timber at all for profit, the present Master of the Rolls (Lord Romilly) has held, that in the case of a settlement by an owner in fee, upon the occasion of his marriage, upon himself for life, with remainder to his issue, the exception of voluntary waste could not have so extensive an effect. The precise terms, however, of the limitation in this respect, were a little different from those in *Garth v. Cotton*; and the degree, to which they were held to authorise the cutting of timber, was special. The case was that of *Vincent v. Spicer* (22 Beav. 380), decided in 1856; and the estate of the tenant for life was described in these words:—"Without impeachment of or for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." Upon this, the following declaration was made by the Court, viz., that the defendant, as assignee of the interest of the tenant for life, is entitled to cut all such timber and wood, not planted or left standing for protection or shelter of the mansion-house, or for the ornament of the house, or growing in lines, walks, vistas, or otherwise for the ornament of the house, or of the gardens, park, or pleasure-grounds, thereto belonging, as an owner in fee-simple, having regard to his present interest, and also to the permanent advantage of the estate, might cut, in a due course of management. An injunction was directed to issue, to restrain cutting otherwise than in accordance with this declaration; and an inquiry was to be made, whether any other cuttings had taken place. His Lordship further ex-

plained his meaning by this illustration :—" Suppose there was a very fine oak-tree, of one hundred years old, at a distance from the house, and not visible from the grounds, which was perfectly mature and fit to cut, though it might possibly still improve a little, I should hold that the tenant for life was entitled to cut that tree ; but if the tree was forty or fifty years old, valuable to cut, but rapidly improving, and had not attained its maturity, I should hold that he was not entitled to cut it. It is a question of degree, in each case, to be determined by ascertaining what a sensible owner in fee of an estate, which he wished to preserve for his children, would do." (See the Order in Seton on Decrees, by Harrison and Leach, title "Injunction.")

o But if the tenant
is to pay the rent
a part to A for life
the estate is to have
the right
Redundant enough
1423 1 Ch 509, 508
estate limited legally
to him for his life
if he should die
before the A's life
then to allow
him to cut and
enjoy the profits
Redundant enough
1423 1 Ch 505
506

It seems, that if a long term of years be declared, at its creation, to be without impeachment of waste, and then it be afterwards settled on one for life, with remainder over, although the life estate is not expressly declared to be without impeachment of waste, it will be so treated, as between itself and those claiming the rest of the term. See *Bridges v. Stephens*, before Lord Eldon, in 1817, reported by Mr. Swanston, from Mr. Merivale's notes (2 Swanst. 150 n. ; Reg. Lib. A. 1816, fol. 757). Whether it would be so, as between the owners of the term on the one hand, and the owners of the reversion on the other, see Lord Eldon's doubts, in *Downshire v. Sandys*, already quoted.

The assignees in bankruptcy of a tenant for life, without impeachment of waste, appear to have the same rights of cutting timber as he has himself. This seems taken for granted throughout the long pending case of *Lushington v. Boldero*, from 1813 to 1851. (See it, *infra*, and in G. Coop. 216, 6 Mad. 149, 13 Beav. 418, 15 Beav. 1.)

Although, as a general principle, the Court of Chancery will not decide whether trees are, in fact, ornamental, and will only inquire whether they have been planted or left standing for ornament, yet, if a deed or will has expressly

ordered the protection of such trees as are, in fact, ornamental, the Court must, and will, determine that question. This is shown by the *Marker Case*, from Devonshire, consisting of three several suits, and reported in 8 Hare (p. 291), 3 McN. & G. (p. 311), and 9 Hare (p. 1). Mrs. Marker, a widow, had settled, by deed, the Combe Estate of 4000 acres, of which part was 1700 acres in the parish of Gittisham, comprising an old Elizabethan house, called Combe House, on the slope of a hill, with three woods rising behind or around it, and forming a belt or boundary to the pleasure-grounds, and covering about 33 acres of land. Above these woods, there was a sheep-walk, or pasture; and the top of the hill was fringed with more wood. The limitations of the settlement were,—to two trustees, Kekewich and Pulman, for 1000 years, without impeachment of waste, save only cutting ornamental timber as after-mentioned; and then, to the settlor herself for life, without impeachment of waste (with the same saving); then to her son, Henry William Marker, for life, without impeachment of waste (with the same saving); then to his eldest son, Henry William Put Marker, for life, without impeachment of waste (with the same saving); then to his first and other sons, and his father's second and other sons, successively, in tail male; then to the settlor's son, Thomas John Marker, for life, without impeachment of waste (with the same saving); then to his eldest son, Richard Marker, for life, without impeachment of waste (with the same saving); then to his first and other sons, in tail male; then to John Marker, the second son of Thomas John Marker, for life, without impeachment of waste (with the same saving); with several remainders over, and an ultimate remainder to Henry William Marker in fee.

The trusts of the term of 1000 years were these:—"In the first place," by felling timber of full and ripe growth, and not ornamental to the house at Combe, or the pleasure-grounds attached to it, or any of the views or prospects

of it, of which timber enough, of the most ornamental, shall always remain, to preserve the beauty of the place unimpaired, or by mortgage or sale, except of the house at Combe, and the hereditaments, &c., in Gittisham, Fairway, Hinton, and Buckerell, or by other reasonable means, forthwith to raise 10,000*l.* for the settlor, her executors, &c.; and in the next place, immediately after her decease, to raise two sums of 10,000*l.* each, one for Thomas John Marker, and the other for Margaret Frances Smith (formerly Marker) wife of the Rev. G. Townsend Smith; with interest on those two sums, at 4 per cent., from the settlor's death.

The date of the settlement was October 11th, 1844. Mrs. Marker (the settlor) died in July, 1846, before her own sum of 10,000*l.* had been raised; but, soon after her death, timber of the value of 1900*l.* was cut, without objection, and applied in part payment of that sum of 10,000*l.* She appointed Henry William Marker her executor. His son, Henry William Put Marker, died in 1849, without issue; and he had no other son when the suits after-mentioned were brought.

In March, 1850, a bill in Chancery, called *Marker v. Kekewich*, was filed, which was afterwards said to have only the object of obtaining authority for the defendant Henry William Marker to cut timber. The plaintiff was Richard Marker, before-mentioned, an infant. The defendants were the trustees, the several tenants for life, and Mr. and Mrs. Smith. The first existing estate of inheritance was Henry William's reversion in fee. All parties were represented by the same solicitor. The bill suggested that Henry William Marker claimed to cut timber for his own benefit, notwithstanding the trustees' power, and that they meant to raise the three sums of 10,000*l.* each by sale or mortgage, instead of by timber, by which means the bill urged that they ought to raise them as far as possible, namely, to the extent of 7000*l.*; and relief was prayed on this footing.

Demurrers to the bill were put in, in the names of H. W. Marker and the trustees; but the trustees afterwards alleged that they were not consulted on the subject. The demurrers were allowed, in May, 1850, after argument before Vice-Chancellor Wigram; and a judicial opinion was expressed, to the effect that the corpus of the property should be held subject to the charges, and that the tenant for life, keeping down the interest of them, might cut timber, as being entitled to the profits of the estate (8 Hare, 291).

The question of the trustees' rights, as between themselves and the first tenant for life, really lay between co-defendants; and a binding decision between them could hardly have been made on demurrer. That their views did not agree, was soon evident; for, in December, 1850, H. W. Marker proceeded to mark and sell a large quantity of timber upon the settled estates; and, thereupon, a second bill was filed, called *Kekewich v. Marker*. This was by the trustees, against H. W. Marker and the other tenants for life. It insisted that the plaintiffs were not consulted about the bill in *Marker v. Kekewich*; and they now repudiated its allegations, and insisted that the timber rights of the successive tenants for life were subordinate to their own; and they prayed for a declaration, and an injunction, accordingly. Lord Cranworth, as Vice-Chancellor, was moved for the injunction; but he refused it, upon the terms of H. W. Marker undertaking to account for the timber, if, and as, the Court should direct. (See this stated 9 Hare, 12.) The motion was afterwards granted by Lord Chancellor Truro, upon appeal, with the expression of an opinion, that the terms of the trust, as to timber, were more extensive and special than such trusts usually were; and with a suggestion that the trustees should adopt H. W. Marker's proposed cuttings, which, indeed, had been partly completed. (See 3 Macn. & Gordon, 311.)

By this time, a third bill, called *Marker v. Marker*, had been filed (22nd March, 1851), by Thomas John Marker and

his two infant sons, Richard Marker and John Marker, against Henry William Marker, the Trustees, and Mr. and Mrs. Smith, alleging that 700 oak-trees, marked by H. W. Marker, and sold, standing, by him, on the 31st of December, 1850, afforded shelter, protection, or ornament to Combe House, or its buildings, offices, or pleasure-grounds, or some of the views and prospects of the same; and praying an injunction accordingly. Upon moving for the injunction, before Sir George Turner, Vice-Chancellor, his Honour, after argument, delivered an elaborate judgment, upon the facts and the law, showing that, in this particular case, the Court must consider ornament in fact, because obliged to do so, by the special terms of the settlement; instead of deciding only the question of what had been planted or left standing for ornament. His Honour then held, upon the evidence before him, that 200 of the 700 oaks were not protected by the words of the settlement; but that it was probable that the remaining 500 oaks, and the three woods in which they grew, were so protected; and, therefore, he granted an injunction, to restrain H. W. Marker from cutting the 500 oaks, or any other trees in the three woods, serving for ornament or shelter to Combe House and its grounds, or the views or prospects "of the same;" with a direction that the Master should approve of a proper security, to be given by the plaintiff to the defendant, for the value of the 500 oaks, and for any loss or damage which the defendant might sustain by being prevented from completing the sale of them, in case the Court should hereafter be of opinion that the order ought not to have been made. The Court also offered to the defendant an inquiry, whether any, and which, of the 500 oaks, or any, and what, other trees, in the three woods, could be cut, without impairing the beauty of the place, as it stood at the date of the settlement; so that time and expense might be saved by confirming the report on petition, at the hearing of the cause. Whether the offer was accepted, does

not appear. Probably, the order was not drawn up : for minutes only of it are given in the new editions of Seton on Decrees, title "Injunctions."

The Court thought, in this case, that it could no more refuse to decide a question of taste, than a question of science, with respect to which, opinions were frequently received and acted on. It found, however, materials for its opinion, in the standard of beauty set up by the settlor herself in the existing state of the place, and in the fact, that she lived nearly two years after the settlement, without cutting any timber in the woods, although they were crowded with it.

It seems, the Court will not sanction the cutting of trees, planted or left standing for ornament, for the mere reason that they are in a decaying state ; and every one, accustomed to observe ornamental timber, will, probably, recollect instances, in which oak-trees, of the greatest beauty, and most likely to have been preserved for beauty's sake, have been in decay for many years. In *Bewick v. Whitfield*, 1734 (3 P. W. 267), Lord Talbot, in giving directions that "timber plainly decaying" should be cut, with the approbation of the Master, added, that "trees, though decaying, if for the defence and shelter of the house, or for ornament, shall not be cut down ;" and in one of the stages of *Lushington v. Boldero*, in 1819 (6 Mad. 149), where the question was, whether timber alleged to have been left standing for ornament or shelter had been properly cut, because it was in a decaying state, Sir J. Leach refused to order an inquiry in those terms ; but he directed the question to be, "Whether any of the trees, cut and sold, injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter intended by the devisor, that the removal of the timber or other trees, so cut and sold, was essential to such purposes of ornament or shelter ?" And the same Judge, acting on a similar principle, in December, 1820,

made the following order, in the *Attorney-General v. Duke of Marlborough* (5 Mad. 280):—"Declare that the defendant, the Duke of Marlborough, by the true construction of the several statutes which are in *pari materia* upon this subject, is not entitled to cut timber or other trees which are standing or growing for the shelter or ornament of Blenheim House, except in the execution of a purpose of improvement in the ornamental character of the gardens, pleasure-grounds, park, and plantations; and it not being alleged that the defendant, the Duke of Marlborough, has in contemplation any general purpose of improvement in the ornamental character of the said gardens, pleasure-grounds, park, and plantations, refer it to the Master to inquire and state whether any and what timber or other trees, which are standing or growing for the shelter or ornament of Blenheim House, may now be cut, with advantage to the present ornamental character of the said gardens, pleasure-grounds, park, and plantations, either because they are prejudicial to more ornamental trees, or because they are too thickly planted to admit of the most ornamental growth, or for any other reason; and let the injunction granted by the Lord Chancellor's order of the ——— day of ——— be continued, until the further order of the Court" (5 Mad. 282).

That a tenant for life or years in remainder, without impeachment of waste, may not anticipate his rights, by cutting timber with the concurrence of the owner of the previous estate in possession, seems clear from *Evelyn's Case*, before mentioned, and from *Fleming v. Fleming*, before Lord Hardwicke, in July, 1744, notwithstanding some doubts suggested by the expressions attributed to his Lordship in the second of the two cases of *Aston v. Aston*, in February, 1750 (1 Ves. Sen. 396). *Fleming v. Fleming* is not formally reported; but from the statement of it made in the argument of *Garth v. Cotton*, as given by Vesey, Sen. (see, 1 Ves. Sen. 526), it appears that the Bishop of Carlisle (*Fleming*) was tenant

in possession for ninety-nine years, if he should so long live, with remainder to trustees to preserve, with remainder to his son for ninety-nine years, if he should so long live, without impeachment of waste, with remainder to the son's first and other sons in tail, with remainders over; and the son, by permission of the Bishop, entered and cut timber, but was restrained by Lord Hardwicke's injunction from continuing to do so. Messrs. White and Tudor, in their *Leading Cases*, refer (in the margin) to the citation of this case in 1 Dick. 209, which is, in fact, Lord Hardwicke's statement of it in his judgment in *Garth v. Cotton* (February, 1753), where he describes the father and son as being successive tenants for life (the latter without impeachment of waste), with remainder to another in fee, and says that the bill was brought by the remainderman in fee, and that the injunction was granted because the son was not to be allowed to exercise his power of doing waste by anticipation.

The second case of *Aston v. Aston*, just mentioned (1 Ves. Sen. 396), was a bill by a mother, jointress for life, impeachable of waste, to stay an action of waste brought by her daughter, tenant in tail, for acts permitted by the mother to be done by her deceased son, Sir Thomas Aston, tenant for life in remainder, without impeachment of waste, with remainder to trustees to preserve, and then to his issue in tail (which had failed), and then to his sister in tail. The waste was by the son's cutting timber, for his own use, with his mother's consent, before his title accrued. The ground, for restraining the action, was the daughter's acquiescence; and it was stayed accordingly. It had been suggested in argument, that the cutting might have been lawful, if Lady Aston, the mother, had demised to a stranger for ninety-nine years, if she should so long live, and then had surrendered her life estate to her son; in reference to which, we are told, that Lord Hardwicke observed, "The mother might have let Sir Thomas have this liberty with

great ease, although the defendant had objected to it, by the method mentioned; for, I take it, the first estate for life might be extinguished by the other, as in *Perk. 113 A.*, title 'Surrender,' which gives the reason for it, and is a good authority, and *Bro.*, title 'Surrender,' 17. Then, consequently, Sir Thomas might have done this lawfully, and no one could have called him to account for it, and the mother would have had the rents and profits of the estate for ninety-nine years;" but his Lordship, shortly afterwards, continued thus: "But the point I go on is, that her (the plaintiff's) conduct was an encouragement, to draw the mother in."

These remarks were before *Garth v. Cotton*. It is most likely that, after that case, Lord Hardwicke would have thought, that the limitation to trustees to preserve would have been enough to defeat the contrivance thus suggested; or, at all events, that he would have treated that contrivance as fraudulent and void; and Lord Eldon said, in *Stansfield v. Habbergham* (see 10 Ves. 279):—"Upon the principle on which, in *Garth v. Cotton*, a party was not permitted to bring forward the estate of a remainderman, in order to get the timber, the Court would say, the trustee to preserve contingent remainders should not permit the tenant for life, by the destruction of the estate, with regard to which he was liable to impeachment for waste, to make use of that legal estate, bound by a trust for him, and also for contingent remainders, that may never arise, for the purpose of cutting timber."

It has lately been suggested, that a tenant for life, who is subject to impeachment of waste, may have a right to cut, for his own use, young timber-trees of marketable value, if such cuttings are beneficial thinnings of the woods or plantations.

In 2 Collyer, 275, there is a very short report of a case of *Pidgeley v. Rawling* (1845), before V.-C. Knight Bruce, in which it is said to have been held, after argument, that, as

Amey v. ... 1877, 307

RIGHTS BETWEEN TENANT FOR LIFE AND REMAINDERMAN. 59

between tenant for life and remainderman, the thinnings of fir-trees, under twenty years of age, belonged to the tenant for life; and that *Rex v. Ferrybridge* (1 B. & C. 375) was cited. How any doubt could have existed on the subject, it is difficult to see. *Rex v. Ferrybridge* merely decided that such fir-trees are not rateable to the poor, as "saleable under-wood;" but they are, certainly, not timber, whether above or under the age of twenty years; and, therefore, they must necessarily belong to the tenant for life, if cut by him. It was not suggested that they were locally made timber, by custom of the country.

In *Bateman v. Hotchkin* (31 Beav. 486), which was the case of a windfall, Lord Romilly appears to have considered that a tenant for life, subject to impeachment for waste, would be entitled to such part, if any, of the windfall, as consisted of timber-trees, which it would have been proper to cut in a course of thinning; and he directed an inquiry as to the particulars of the windfall, in this respect and others. It is believed, however, that there is no express decision, that an impeachable tenant for life may thin timber woods, for his own benefit. Many trees, in a wood or plantation, may have come to an age of saleable value, as timber, although the removal of them might give more scope for the growth of other trees of a like kind; and it would be very dangerous to allow the tenant for life to cut such trees, at his own discretion. If worth forty pence to sell, the cutting of them must be legal waste. See *ante*, pp. 4, 23. There seems, however, no reason to doubt, that the Court of Chancery, if applied to, would thin the woods, by cutting young trees, upon the same principle upon which it cuts trees which would otherwise decay: and the safe course, for the tenant for life, impeachable of waste, to pursue, would be, to file a bill against all proper parties, praying that the thinnings may be made, under the sanction of the Court; and that it may be decided whether he is entitled, absolutely, to their produce;

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and that, if the decision is in his favour, the produce may be paid to him accordingly; and that, if he is not so entitled, then, that the amount may be treated as part of the inheritance, and laid out accordingly, and the income paid to him during his life, upon the principles adopted by the Court in the case of its cuttings of decaying timber. It is hardly necessary to add, that these observations apply only to thinnings of trees which are timber; because, as before shown, the cutting of trees which are not in their nature timber-trees is not waste, even if they are of mature growth.

It often happens, that the lands of a tenant for life, without impeachment of waste, are liable to be sold, under a power, either by trustees, with his concurrence or without it, or by himself, with the trustees' consent. The produce of the sale is, in such cases, usually meant to be laid out in land, to the same uses. Questions will then arise, of this kind: 1st, May the tenant for life cut timber, and yet a valid sale be afterwards made? 2ndly, If he can, may he also cut the timber on the new lands, when bought? 3rdly, If the timber is standing at the time of the sale, may he claim to have its value paid to himself? 4thly, If he may not, but yet it is paid to him, will that payment make the sale bad? Upon these points, the decisions are few, but alarming.

In the case of *Countess Dowager of Plymouth and Another v. Lady Archer*, 1782 (1 B. C. C. 158), a real estate in Essex was devised upon trust to sell, and to invest the proceeds, together with some personal estate, in buying lands in Warwickshire, of which Andrew Lord Archer was to be tenant for life without impeachment of waste, with remainder to the plaintiffs, as tenants in common in tail; and the "rents and profits" of the Essex estate, till sale, were to belong to the persons who would be entitled to the Warwickshire lands, when bought. Before any sale was made, Andrew Lord Archer cut and sold timber on the Essex estate, and died; and the bill was brought against his executrix, for payment of the

amount. She justified the cutting, by insisting that the gift of the rents and profits, till sale, gave the same rights, over the lands to be sold, as over the lands to be bought ; but a decree in the plaintiff's favour was made by Sir Thomas Sewell, at the Rolls, and affirmed by Lord Thurlow, on appeal ; the latter saying, that "rents and profits" must mean only annual rents and profits ; and that, to give the tenant for life the rights contended for, would be to give him "double waste, which would be too much."

The chief importance of this case consists in the reference made to it by Lord Eldon, in *Burges v. Lamb* (16 Ves. 174), from which it seems he thought Lord Thurlow's reason of "double waste" would apply to a case of lands liable to be sold under a power, as well to such a case as *Plymouth v. Archer* itself, where lands were absolutely devoted to sale, and of which the timber was obviously a part ; and in which the gift of rents and profits, till sale, could hardly, possibly, mean anything else but ordinary annual fruits.

In the common case, of a settled estate being liable to be sold, under a power, if the tenant for life shall himself desire it, or consent, he must, in the meantime, have all the rights of a tenant for life ; and if the estate is afterwards sold, for a price less than it would have fetched, if timber upon it had not been cut down, it would not be a judicious moral use of the discretionary power of trustees, in making a reinvestment in land, to buy an estate with much timber upon it, which, when acquired, may again be made the subject of cuttings, which will give the tenant for life the advantage of "double waste," as Lord Thurlow expresses it ; by which, of course, the gross value of the inheritance will be reduced, as it will stand on the new purchase. Still, the question is, probably, a moral one only, as against the trustees ; unless corruption or connivance with the tenant for life, in sacrificing the interests of the remainderman, can be brought home to them.

It may, perhaps, be right, to mention here, that Lord Thurlow himself, in a very peculiar case under a will, gave the produce of timber, cut by mistake, to a remainderman, who was entitled to "rents and profits" during a suspense of present title to the lands. *Dare v. Hopkins*, 1788 (2 Cox, 110).

In *Burges v. Lamb*, before Lord Eldon, in 1809 (16 Ves. 174), the bill was brought by the first existing tenant in tail (afterwards Sir Charles Montolieu Lamb), against the two present tenants for life, who were also trustees under a will, which had given a fund of personal estate to be laid out in land, to be settled to uses, under which they would successively be without impeachment of waste; and the complaint was, that they had bought the estate of Beauport, in Sussex, with the Manor of Oare [Ore], for a sum of 21,500*l.*, of which as much as 1603*l.* was the price of the standing timber upon it; which the first tenant for life might, therefore, cut down. The bill sought to prevent this being done; and the question turned on the prudence and good faith of the purchase. Lord Eldon, (upon motion) after alluding to *Plymouth v. Archer*, said, he could not deny Lord Thurlow's opinion in that case, that a purchase might be made of an estate, in which the tenant for life, without impeachment of waste, would have the right, to some extent, of cutting timber; and that the only rule left by that case was, that the purchase is to be such, as the trustees, in a just and sound exercise of their discretion, could make; but if, under that act, the tenant for life acquired the right to cut some timber, that mere circumstance would not make it an abuse of their trust, or a mistaken exercise of their discretion.

On a subsequent discussion, (of the same motion) Lord Eldon, alluding again to Lord Archer's case, said, that the Court, taking care that the fund shall be laid out, as Lord Thurlow says, according to a reasonable and sound execution of the trust, must not, on the other hand, place trustees in such

difficulties, that they never can execute a trust of this sort without coming to a Court of Equity; that, in the case before him, there were several tenants for life unimpeachable of waste, and it was very difficult to hit the ratio; but if the timber bore a very considerable proportion to the value of the whole purchase, the tenant for life, especially as he was one of the trustees, could not, possibly, be permitted to take it.

In the particular case before him, Lord Eldon thought the frame of the bill prevented the injunction being maintained.

We now know that, so lately as 1792, it was thought very doubtful, whether a tenant for life, without impeachment of waste, might not retain, for his own use, the value of the timber, if the estate was sold under a power. This appears from the case of *Doran and wife v. Wiltshire*, reported in 1827, by Mr. Swanston, (3 Swanst. 699) from a note of Mr. Le Mesurier, amongst Lord Colchester's MSS., of which the only result that appears, on this point, is, that Lord Thurlow said he thought that, as to the produce of the timber-trees, the plaintiff Doran (tenant for life) was not entitled to it; and that there was a great difference between his cutting down timber, for which he was not impeachable, while he actually occupied the land, and his executing a power to sell.

[The power, in this case, was to the plaintiffs, (husband and wife) to sell, with consent of trustees, who were to receive the money, and reinvest it in land to the same uses, in the usual manner.]

Still, in 1806, the right of tenant for life, without impeachment of waste, was thought doubtful, in a case where the power of sale was in trustees, and was exercised with his consent. In *Wolf v. Hill*, before Sir William Grant, the tenant for life, upon such a sale, claimed the right to the value of timber he had cut from the sold estate, and also the value of the timber still standing upon it. Sir William Grant gave him the former, but refused him the latter. Of this case, also, only a very short note exists; and that note did

Redundant
1925 1 Ch. 500

not appear, until printed, from Mr. Merivale's MS., between 1820 and 1822, by Mr. Swanston (2 Swanst. 149). It is, probably, the same case as that alluded to by Sir L. Shadwell, in *Waldo v. Waldo* (12 Sim. 112).

In this state of the printed authorities, it must sometimes have happened, that a tenant for life, without impeachment of waste, did, in fact, receive the value of the timber standing upon the estate when sold; and the utmost consequence of such a mistake, which can be supposed to have been thought likely, was this—that the tenant for life must restore the timber money to the trust, for re-investment in land. It was not long, however, after the note of *Wolf v. Hill* appeared, that the startling suggestion was made, that if, under the usual power to sell the land, and, to that end, to revoke the uses, the land was sold separately from the timber, although at the same time and to the same purchaser, the power to revoke did not arise, and therefore, the execution of it was void. This occurred in the case of *Cholmeley v. Paxton*, which began in the year 1823, and lasted nine years. It is reported in many books; but no one of them contains all its circumstances. The books are, 3 Bingham, 207; 5 Bingham, 48; 10 Barnewall & Cresswell, 564; 3 Russell, 565; 1 Russell & Mylne, 418; 6 Bligh (N.S.) 120; and 1 Clark & Finnelly, 60.

The facts were, that, in the year 1782, the manor, the house, and the lands of White Knights, in Berkshire (near Reading), containing about 250 acres, and other hereditaments of larger value, stood limited, under the will of Sir Henry Englefield, Bart., to the use of his eldest son, Sir Henry Charles Englefield, Bart., for his life, without impeachment of waste (except in the house and offices), with remainder to his first and other sons in tail male, with remainder to the testator's second son, Francis Michael Englefield for life, and his first and other sons in tail male, with remainder to the testator's daughter, Teresa Anne Englefield, who in the year 1782

married Francis Cholmeley, for her life, with remainder to her first and other sons in tail male, with remainder over ; and there was a power to Lord Cadogan and Sir Charles Bucke, or the survivor of them, and the heirs of the survivor, during the lives of the three tenants for life just mentioned, or of any or either of them, at the request, and by the direction, or appointment, of the person in possession, to sell, and, "to that end," to revoke the uses, and appoint the premises to the purchaser, or to such uses as should be necessary for effecting the sale, and to give receipts for the purchase-moneys, which should discharge the purchaser ; and it was provided that the moneys arising from the sale should be laid out in the purchase of other lands, to be conveyed to the same uses, and, in the meantime, should be invested in Government or real securities.

In the year 1782, Sir Henry Charles Englefield was the tenant for life in possession, and without issue ; his brother, Francis Michael, was without issue ; his sister Teresa, if then married, had no son ; and Lord Cadogan had survived Sir Charles Bucke. In this state of things, Sir Henry entered into a correspondence with the agents of Mr. William Byam Martin, for the sale to him of White Knights, for 12,000 guineas (12,600*l.*), exclusive of the timber, which was to be paid for by valuation, in the usual manner. Some additional land, called Foxholes, was afterwards added, at the price of 800*l.* ; so that the understanding was, that the estate of White Knights should be sold for 13,400*l.*, and that the timber should be paid for at a valuation ; and it was also arranged that the furniture in the house (probably of small value) should be included in the purchase-money of 13,400*l.* No formal contract was ever drawn up between Sir Henry or his trustee, on the one hand, and Mr. W. B. Martin on the other ; but Lord Cadogan, as the surviving trustee, adopted the sale made by Sir Henry ; and the timber was valued by two surveyors at 2448*l.* ; and a few months after the cor-

respondence had ceased, namely on the 12th of May, 1783, a deed of conveyance was executed, between Lord Cadogan, Sir Henry Englefield, and Mr. William Byam Martin, which was eventually treated as the only proper evidence of what the nature of the contract of sale had been. By that deed, which was duly executed and attested as required by the power of sale, it was recited that Lord Cadogan, in exercise of the power, and at the request and by the direction of Sir Henry, contracted with Mr. Martin for the sale to him of the manor of White Knights, with its rights and appurtenances (except as after excepted), and the House of White Knights, buildings, gardens, fixtures and furniture, and the park, lands, tithes, and hereditaments thereafter granted, bargained, and sold, for 13,400*l.*, and that Sir Henry, who was tenant for life, without impeachment of waste, was entitled to the timber and trees standing and growing and being on the premises so agreed to be sold, and had agreed to sell all the said timber and timber trees to Mr. Martin, at the price of 2448*l.*; and it was witnessed that, in consideration of 13,400*l.* paid to Lord Cadogan, he revoked the uses, and appointed the property to Mr. Martin and his trustee; and, at the same time, he granted, bargained, and sold the property to the same persons, expressly including, in the grant, the ground and soil of all trees, woods, and underwoods (see 3 Russ. 568). Then Sir Henry, in consideration of 2448*l.* paid to himself, granted, bargained, and sold to Mr. Martin and his heirs, all the timber, and all the fruit and other trees, and all woods and underwoods upon the lands, thereby granted, bargained, and sold; and Sir Henry also, in consideration of the 13,400*l.*, which had been paid to Lord Cadogan, assigned to Mr. Martin all the fixtures and furniture in the house.

In accordance with the terms of this deed, the 13,400*l.* was, in fact, paid to Lord Cadogan, and the 2448*l.* was, in fact, paid to Sir Henry. The timber was left standing.

A large part of the purchase-money received by Lord

Cadogan was laid out by him upon mortgage; and the remainder was invested in the Funds; and of this remainder, a sum of 3470*l.* 1*s.* 2*d.* Consols was applied, in 1799, in the redemption of land-tax affecting the unsold parts of the devised estates.

In the very year of the sale, 1783, Teresa Cholmeley, Sir Henry's sister, had a son, Francis Cholmeley, who became of full age in 1804. In 1806, Mr. Nowell, the then solicitor of Sir Henry, but who appears not to have acted on the occasion of the sale, having learned, in conversation with him, that he had received the value of the standing timber, suggested to him that it was doubtful whether he was entitled to it; and, in consequence of that suggestion, Sir Henry, on the 29th of July, 1806, transferred into the name of Lord Cadogan, as a trustee under the late baronet's will, a sum of 3681*l.* 4*s.* Consols, being the amount of stock which might have been purchased with 2448*l.* cash, on the 12th of May, 1783. It is remarkable that this was a few days after Sir W. Grant's decision in *Wolf v. Hill*. Steps were then taken for the execution of a declaration of trust, of this new fund, by Lord Cadogan; but before this could be effected, Lord Cadogan died, and the trusteeship devolved upon his heir, who was a lunatic. In the year 1810, Teresa Cholmeley died. In 1819, a private Act of Parliament was obtained, with the concurrence, amongst other parties, of Francis Cholmeley, for the appointment of new trustees, and for the transfer of the trust funds, including the timber money, to them; but the deed of the 12th of May, 1783, was not expressly recited in the act. Further parts of the trust funds, to the extent of several thousand pounds, were applied in payment of the expenses of the act, of the costs of an enclosure, and the costs of an exchange of the unsold estates, and in the satisfaction of other charges on these estates.

In March, 1822, Sir Henry Charles Englefield died, without issue. His brother, Francis Michael, had previously died,

also without issue; Teresa Cholmeley was also dead; and Francis Cholmeley, therefore, became tenant in tail in possession of the devised estates, except so far as they had properly been sold. Upon the assumption that the sale of White Knights had been valid, he presented a disentailing petition to the Court of Chancery, under Lord Eldon's Act (39 & 40 Geo. III. c. 56), for the transfer to him, as tenant in tail, of the funds in the hands of the trustees under the Act of 1819, including the timber money; and upon this petition, after a reference, a final order was made, in November, 1822, for the transfer of the funds to him. Just at this time, however, he found reason to believe that the sale of 1783 could be set aside, and that it would be his interest that it should be so.

The ownership of the property, between 1783 and 1822, had been, in substance, this:—White Knights had been sold by Mr. W. Byam Martin, and had become the property, by purchase, of the Duke of Marlborough, who had laid out very large sums indeed in its improvement, and had mortgaged it, for a large sum of money, to the house of business of Sir Charles Cockerell and Messrs. Paxton & Trail; and in a suit instituted by those mortgagees, in the Court of Chancery, the estate had been put up to sale, and had been bought, on the 17th of July, 1822, by Sir Charles Richard Blount, for 37,000*l.*, subject to a good title being made to him.

In this state of things, Francis Cholmeley determined not to take the transfer, under the order of November, 1822, of the funds which constituted the remainder of the purchase-money of 1783, but to proceed to recover the estate, under his title of tenant in tail under his grandfather's will. For this purpose, he brought an action of *formedon*, in the Court of Common Pleas, in 1823, simply alleging his title under the will. To this action (called *Cholmeley v. Paxton*) the mortgagees were the defendants. They pleaded, in form,

besides other less important pleas, the revocation of the uses of the will, by setting forth the deed of 1783, and the investment of the 13,400*l.*, and also of the 2448*l.*, in the name of Lord Cadogan, upon the trusts of the will, and according to its directions. To the plea of the revocation of the uses by the deed of 1783, the plaintiff demurred. Upon the plea of the investment of the moneys, he took issue. The demurrer was argued, in the Court of Common Pleas, in 1825, and judgment was given for the demandant (3 Bing. 207). Upon this, a writ of error was brought in the King's Bench, where the judgment was affirmed, in the year 1828 (10 B. & C. 564). Pending these proceedings, the truth of the issue, as to the investment, was tried at the assizes, in the year 1827, when the judge (Littledale, J.) directed the jury, that the 2448*l.*, not having been obtained by a sale, pursuant to the directions of the will, could not be said to have been invested under the will; and, accordingly, a verdict was found for the demandant. This finding, the Court of Common Pleas, in the year 1828, refused to disturb (5 Bing. 48).

In the meantime, a bill in Chancery was filed, in February, 1826 (*Cockerell v. Cholmeley*), by the mortgagees, the purchaser, the Duke, and a trustee for him, against Francis Cholmeley, suggesting acquiescence, on his part, in the sale of 1783, and afterwards, by amendment, setting forth the correspondence of 1782, which was alleged to show grounds for reforming the contract, in such manner as would have made it a valid agreement for sale. An injunction against further proceedings at law, was obtained, in the first instance; but, after argument before Lord Eldon, and a perusal by him (by arrangement) of the correspondence about to be inserted by amendment in the bill, he decided, that the injunction must be dissolved, upon the ground that no sufficient reason had yet been shown why the question of the validity of the sale should not be fully tried at law (see 3 Russ. 565, *Cockerell v. Cholmeley*). The Chancery suit was

afterwards (in 1830) brought to a hearing, before Sir John Leach, as Master of the Rolls, by whom it was dismissed (1 Russ. & Mylne, 418) ; and his decree was affirmed by the House of Lords, in the year 1832 (see 1 C. & F. 60, and more fully in 6 Bligh, N. S. 120, where the correspondence of 1782 will be found).

The reasons, for the determination of the case, at law, will be found best stated by the Judges of the Court of King's Bench ; and they were, in substance, these only—viz., that the power of revocation was to arise only “to the end” of carrying into effect a valid sale, when made by the trustee ; that no valid sale had, in this case, been made by him, because it was a sale of the land without the standing timber, which was parcel of it ; and, consequently, the power of revocation never arose.

There was strong ground for argument that the power of revocation was to enable the trustee to sell, and not merely to enable him to give effect to a previous sale ; and that, if the revocation had been made, the original uses existed no more : but the Court insisted upon making the regularity of the sale an essential part of the efficacy of the revocation ; in other words, a condition precedent of bringing the power into operation—so that the Court made itself the judge, not only of the compliance with the formalities of the execution of the power, and of the happening of the events in which it was to arise, but of the propriety of the transaction of which the professed execution of the power was a part.

The reasons given by the Court of Chancery, and by the House of Lords, against equitable interference, were—1st, That the question, whether the power came into operation or not, was a question of law only ; 2ndly, that the demandant at law had not, by his acts, precluded himself from questioning the validity of the sale ; and 3rdly, that the correspondence did not show that a binding contract had

ever been entered into by the trustee, Lord Cadogan, for the sale of the land inclusive of the timber.

The case does not show what are the general rights of an ousted owner of the estate to receive back the original purchase-money. Sir John Leach assumed that it was to be given back, in this particular instance; but no offer to that effect appears upon the reports; and part of it had been already applied in improvements of the unsold estates. It is probable that, as a matter of honour, the amount of it was paid to the mortgagees; and, it is not unlikely, that the Court of Chancery would have raised an equity in their favour, upon the principle, that a vendor cannot be allowed to repudiate a contract for sale, and yet to keep the purchase-money.

In the case of *Doe dem. Blewitt v. Phillips*, in 1841 (1 Q. B. 84), an action of ejectment had been brought, upon the principle of *Sir H. Englefield's Case*. It was caused by a sale, under the Land Tax Redemption Acts, by a tenant for life, without impeachment of waste, effected in 1807 and 1808, under the 42 Geo. III. c. 116 (ss. 51 and 98), which makes it essential that the purchase-money shall be paid into the Bank of England. The timber was sold to the purchaser of the estate, but upon a separate valuation, and under a contract that its price should be paid to the tenant for life. The conveyance did not notice the timber, or its price; and even the general words did not mention it; but it remained standing on the land, and passed by the conveyance. The purchase-money, exclusive of the timber, was the only consideration stated in the deed; and the amount of it was paid into the Bank. The timber-money was retained by the tenant for life for his own use. About thirty years after the transaction, and within about six years after the death of the tenant for life, the remainderman, his son, brought an ejectment against the purchaser. The Court of Queen's Bench thought that the sale would have been invalid,

by reason of the whole purchase-money for the land, which, in effect, consisted in part of the timber, not having been paid into the Bank ; but that the defect was cured by the two subsequent statutes of 1814 and 1817, 54 Geo. III. c. 173 (s. 12), and 57 Geo. III. c. 100 (s. 25), which provided for accidental defects in the purchaser's title.

With reference to mistaken appropriations by the tenant for life, of the timber-money, upon a sale under a power, the statute 22 & 23 Vict. c. 35, usually called Lord St. Leonards' Act, contains a provision, in sect. 13, in these terms, viz. :—

“ Where, under a power of sale, a *bonâ fide* sale shall be made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall, by mistake, be allowed to receive, for his own benefit, a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill, or claim, or application in a summary way, as the case may require or permit, to declare, that, upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest, under the direction of the Court, upon such parties as, in the opinion of the Court, shall be entitled thereto, the said sale ought to be established ; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid ; and thereupon the legal estate shall vest and go, in like manner as if the power had been duly executed ; and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.”

The language of this clause seems prospective only.

The action of waste doth not lie but upon a lease made & against the will by the Cestuy, or tenant in possession, or guardian
31 H.N.B. 50 I; Coke 2nd Inst. 299;

Steph v. Myer, 10 H.N.B. 2nd Inst. 298
St of Westminster II Ch 14 Coke 2nd Inst. 309

An action of waste doth lie against tenant by the Cestuy, in demer, for years, life, for years or half a year or guardian in Chivalry by him that holds the free estate of inheritance. Co: Litt 63a

Q: Is it not that waste never lay against owner of the inheritance: in the first and second cases the first by in Chivalry & the second

CHAPTER III.

RIGHTS BETWEEN TENANT IN TAIL AND REVERSIONER.

A TENANT in tail, in possession, and of full age, under an ordinary limitation in tail, is as much entitled to commit waste as a tenant in fee simple would be, and, of course, therefore, to fell timber and convert it to his own use. The principle upon which this is allowed, seems to be, that, for the last 400 years, or thereabouts, an ordinary tenant in tail in possession has been able to convert his estate into a fee simple by suffering a recovery, or (in later times) by making a disentailing deed. **Q No.** At common law the action of waste

Questions, however, of some nicety, are, whether those tenants in tail who cannot acquire the fee have the same rights of committing waste as tenants in tail who can. The incapacity may arise from one of two causes:—1st. A restraint by statute from barring the entail and the remainders; 2nd. Being under the age of twenty-one years.

As to the first, the restraint may be imposed by a special statute, as in the cases of the Duke of Marlborough, the Duke of Wellington, the Earl of Shrewsbury, the Earl of Abergavenny, and some others; or from the general prohibition (34 & 35 Hen. VIII. c. 20), against barring a reversion reserved to the Crown, upon its own grant, within the meaning of that statute, or from the general statutory provisions affecting tenants in tail after possibility (14 El. c. 8), and married women who are tenants in tail *ex provisione viri*, under settlements made before the Act 3 & 4 Will. IV. c. 74; but the cases of such married
for his estate was created by his father, who might expressly have qualified against waste Coke 2nd Inst 299.

The Statute above cited clearly extended the action against tenant by Cestuy, or for years

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women have, in practice, been considered as standing upon the footing of tenants in tail after the possibility of issue extinct. See the cases, before Lord Nottingham, already mentioned; *Skelton v. Skelton* and *Abraham v. Bubb*.

With regard to tenants in tail restrained by special statute, Sir John Leach has expressed an opinion, in the case of *Attorney-General v. the Duke of Marlborough* (3 Mad. 498), 1818, that the Duke's incapacity of barring the entail would not prevent his committing either legal or equitable waste, if it were not that his obligations to maintain the house of Blenheim bring him within the rules of equitable waste, as to the trees about it. It is probable that the Vice-Chancellor's reasoning, which is of the strictest technicality, will not be thought very satisfactory. It is hardly possible to understand upon what principle a tenant in tail, who cannot extend the duration of his interest beyond his own life, should be in any better position than a tenant for life, so denominated, would be. The statute, which restrained him from enlarging his estate, might have declared, if thought desirable, that he should be free from impeachment of waste.

As regards tenant in tail after possibility, his rights had been much discussed in *Lewis Bowles's Case* (11 Co. 79 b), and it had been there laid down that he was exempt from impeachment of waste, by reason of the inheritance which once was in him. Lord Eldon appears to have understood this as meaning that he must once have been tenant in tail in possession, *with* possibility, and, consequently, have then been able to commit waste at his pleasure; and we shall probably think, upon a review of the cases to be mentioned presently, that this is, still, the just opinion. It applies, however, only to legal waste; for it has been settled, ever since the cases in the latter half of the seventeenth century, to which we have already referred, that a tenant in tail after possibility is subject to the same restraints, in respect to equitable waste, as a tenant for life.

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The question of the right of a tenant in tail, after possibility of issue extinct, to commit legal waste, came before Lord Eldon, in the case of *Williams v. Williams* (15 Vesey, 419), 1808, upon an application for an injunction, by the remaindermen in fee. The property had been settled, upon a marriage, to the husband for life, without impeachment of waste, with remainder to trustees to preserve, with remainder to the wife for life, for her jointure and in bar of dower, with remainder to the children successively in tail male, with remainder to the heirs of the bodies of the husband and wife, with reversion to the husband in fee. There was no child of the marriage: the husband devised the reversion to his nephews, (the plaintiffs) and died, leaving the wife surviving. Upon her cutting timber, the bill was filed. Lord Eldon seems to have doubted, whether she was tenant in tail after possibility at all, and, still more, whether tenant in tail after possibility could cut timber, unless he or she had been previously tenant in tail in possession *with* possibility, inasmuch as *Lewis Bowles's Case* seemed to show that if a tenant in tail after possibility was entitled to cut timber, it was by reason of the inheritance which was formerly in him. His Lordship also suggested that it would be evidently a surprise upon the settlor, if the wife, whose estate for life was not made dispunishable of waste (although the husband's was), should be entitled to commit waste, by reason of the limitation to the heirs of the bodies of husband and wife, in which her life estate could not merge, because it was of equal quantity. He, accordingly, sent a case to the Court of King's Bench, with three questions, viz.:—1st. Was the wife dispunishable of waste? 2nd. Could she convert the waste to her own use? 3rd. Was she tenant in tail after possibility of issue extinct? The whole Court answered all these questions in the affirmative; but without giving reasons (see 12 East, 209).

It is probable that the Lord Chancellor acted on this opinion, although, apparently, not in accordance with his

own ; for no further mention of the case is made in the reports. So long, therefore, as the opinion of the Court of King's Bench in *Williams v. Williams* shall be considered law, it may be assumed, that a tenant in tail after possibility may commit legal waste, and convert it to his own use, although not expressly empowered to do so, and although he has never been tenant in tail in possession with possibility ; and, secondly, that under a limitation to one for life, with remainder to himself in special tail, although his life estate does not come into possession until the possibility of issue in tail has ceased, he becomes, at once, tenant in tail after possibility, and, as such, entitled to the same legal rights of committing waste as a tenant in tail *with* possibility would have.

It seems impossible to reconcile the opinion of the Court of King's Bench with the resolution said to have been come to in *Lewis Bowles's Case* (11 Co. 80 b ; 81 a), viz., that "the estate of a tenant in tail after possibility ought to be the remnant and residue of an estate tail ;—and that by the act of God and the law, *sc.*, by the death of one donee without issue : and because the wife, in the case at bar, had the estate for life by limitation of the party, and the estate which she had in the remainder, *sc.*, of the tenancy in tail after possibility, was not a larger estate in quantity, and therefore could not merge the estate for life, as has been said before : for this cause, the wife was not tenant in tail after possibility."

It might have been supposed, that, although the life estate did not merge in the remainder in special tail, yet that there would be such an union of the two estates, under the operation of the rule in *Shelley's Case*, as would make the wife tenant in tail special with possibility, during her husband's life, and tenant in tail after possibility, subsequently ; and, perhaps, this was the opinion of the Court of King's Bench. It may be said that, in *Lewis Bowles's Case*, the limitation was to the husband and wife for their lives, that is, jointly, and not to them separately and successively, as in *Williams v. Wil-*

liams ; but it is evident, from the second resolution, reported by Lord Coke, that the limitation for life must have been (or considered to be) more than for their lives jointly, and that it must have been to the survivor for his or her life. The truth is, that inasmuch as the Court decided, in *Lewis Bowles's Case*, that the wife was, after her husband's death, tenant for life without impeachment of waste, and that such a tenant is entitled to the property of windfalls, it became unnecessary to determine whether she was tenant in tail after possibility, or not, or what were the rights of such a tenant, as to waste. Equally unnecessary was the resolution, thus reported by Lord Coke, immediately after the passage just cited, viz., "It was resolved, that, in this case, the wife should have the privilege of a tenant in tail after possibility, for the inheritance which was once in her ; for now, when John the issue male is dead, the privilege which she had, in respect of the inheritance which was in her in remainder, shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder, as well as of a possession." In that case, there was no limitation to trustees to preserve contingent remainders, and, therefore, it was considered that the husband and wife were tenants in tail in possession until the birth of issue ; but, although in *Williams v. Williams*, such trustees were interposed after the husband's estate for life, but not after the wife's, and consequently no act of the husband's could defeat the rights of the issue, if he had survived, yet, until issue born, he had an estate for life in possession, with a mediate remainder in special tail, and the wife had an estate for life in remainder, with an immediate remainder in special tail, and the wife might, with her husband's concurrence, have barred (at least) the remainder over to the husband's heirs, and consequently to the nephews, who were the plaintiffs in the suit, as devisees, and one of whom was himself the heir. This is all that the wife, in *Lewis Bowles's Case*, could have done. She and her

husband together, but not she herself without him, could have barred the remainderman under whom the plaintiffs claimed.

In *Platt v. Powles* (2 M. & S. 65), in 1813, the full Court of King's Bench, at Serjeants' Inn, considered it clear that there may be a tenancy in tail, after possibility, of a remainder, as well as of an estate in possession. They seem to have assumed, that such an estate must have been originally an estate tail *with* possibility ; but they took a singular view of the possibility. The case was that of a devise by a husband, in remainder after his mother's death, to his wife for life, and then to the heirs of her body by him, with remainder over in fee. The testator left his mother and his wife surviving him. His wife was not pregnant at his death ; and there never was any issue inheritable under the entail ; but the Judges held that, when the husband died, there was a possibility, for some succeeding time, of his wife having issue by him, and therefore she was actual tenant in tail so long as that possibility lasted, and consequently, that, when the mother died, although that possibility had long ceased, she was entitled to cut timber. The truth is, however, that, at the husband's death, there was *no* possibility of issue inheritable. Although the impossibility was not yet apparent, it was not the less a certainty. The principle, that the tenant in tail must have been, at some time, capable of issue inheritable, is not impaired by this inaccurate application of it by the Judges. It may be as well to remember that three of the four Judges who decided this case had certified the opinion we have stated, in the case of *Williams v. Williams*.

To this may be added, the expression of Lord Campbell's opinion, in *Turner v. Wright* (2 De G. F. & J. 234), that the power of a tenant in tail, after possibility of issue extinct, to commit legal waste, results from regard to the inheritance which once was in him ; but that, as regards equitable waste, he is to be treated as if he were a tenant for life.

Being in all this ruins the point that waste is damage to or destruction of the inheritance, and tenant in tail is owner of the inheritance, he is the person to sue and not be sued.

RIGHTS BETWEEN TENANT IN TAIL AND REVERSIONER. 79

Upon the right of an infant tenant in tail, or rather his guardian, as between himself and those in remainder, to commit waste in timber, it is believed there is but one decision expressly in point, and that is a case called *Mr. Savil's* or *Saville's*, of which there is no detailed report.

It appears, from Moseley's report of a case of *Clavering v. Clavering*, before Lord Chancellor King, on the 10th of Nov. 1729 (Moseley, 219), that Mr. Lutwyche, one of the counsel for the defendants, addressing the Lord Chancellor, said : " In *Savil's Case*, the guardian by nurture cut down seven or eight thousand pounds' worth of timber, when the tenant in tail lay a dying ; and I moved your Lordship, for the next in remainder, for an injunction ; and your Lordship denied the motion, because the guardian had a power to make what advantage she thought proper, of the estate, for the infant. And after the death of the tenant in tail, a bill brought by the remainderman for relief was dismissed, because the tenant in tail had a power over the inheritance, and the guardian might exercise that power in any manner she thought proper ; and the plaintiff here is in *Savil's* condition. He that is in remainder after tenant in tail must be subject to the power of the tenant in tail ; and what he can do, the guardian may do."

Saville's Case was again mentioned in *Glenorchy v. Bosville*, before Lord Talbot, in Michaelmas term, 1733, reported in cases *tempore* Talbot, sometimes called Forrester's Reports (p. 3, see p. 16), where, upon counsel asserting that no instance could be shown, where a tenant in tail had been restrained from committing waste, by injunction of this Court, the Lord Chancellor said : " That was refused in *Mr. Saville's Case* of Yorkshire, who, being an infant and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down, by his guardian, a great quantity of timber, just before his death, to a very great value. The

remainderman applied here for an injunction to restrain him, but could not prevail."

We have the case mentioned by Lord Hardwicke, on 3rd of July, 1741, in a case of *Lyddal v. Clavering*, of which a note is printed in Mr. Blunt's edition of Ambler (p. 371) from Serjt. Hill's MSS. Lord Hardwicke appears to have there said: "The bill is only for an injunction to restrain the defendant from interrupting the plaintiff in carrying off the coals dug in the ancestor's lifetime. One circumstance has been insisted upon, on the defendant's part, that the mine was opened in the possession of an infant tenant in tail by his guardian; but I am of opinion that this makes no difference; for an infant tenant in tail has the same right as one of full age, with respect to the remainderman, though, indeed the guardian is solely accountable, for his management, to the infant, at the full age, or to any one who stands in his place. And this point was so determined in *Mr. Saville's Case*, by my Lord King, who refused to grant an injunction to a remainderman, after an estate tail, when the guardian of the tenant in tail was cutting down the wood and timber upon the estate, and converting it into personal estate, which is a stronger case than the case of opening a mine, for that is a benefit to the whole kingdom; and therefore I mention this circumstance to lay it out of the case."

Moseley's Reports was a posthumous publication, which did not appear till the year 1744, after the time at which Lord Talbot had alluded to *Saville's Case* in 1733, and Lord Hardwicke had done the like in 1741. But it will be observed that the terms in which they state it correspond with Moseley's account of it. It must have occurred some time between the 1st of June, 1725, when Lord King became Lord Chancellor, and the 10th of Nov., 1729, when it was mentioned in arguing *Clavering v. Clavering*. With reference to the reason, there given, for the decision, namely, that the tenant in tail had a power over the inheritance, it must be

borne in mind that, in those days, there was a proceeding, by which an infant tenant in tail could suffer a recovery, viz., by obtaining a privy seal from the King, recommending the Justices of the Common Pleas to allow the infant to suffer the recovery, which recommendation the Justices, no doubt, usually adopted, although it seems they were not absolutely obliged to do so. (See *Turn. & Russ.* 175, and 1 *Ves. Sen.* 480.) It was probably upon this principle, that Lord Talbot decided, in *Chaplin v. Chaplin* (3 P. W. 234), in 1733-4, that an infant tenant in tail was no more bound to keep down the interest of a mortgage than an adult tenant in tail; who, certainly, would not have been so liable. But the contrary opinion was expressed by Lord Hardwicke, in *Sergeson v. Sealey*, in 1742 (see 2 *Atk.* 416, and 9 *Mod.* 396), and repeated by him in 1750, with reference to the same case, which is called *Sarjeson v. Cruise* (1 *Ves. Sen.* 480); and it is now understood to have been fully settled, by a decision of Sir Thomas Plumer, in *Burges v. Mawbey*, 1823 (*Turn. & Russ.* 167), that an infant tenant in tail is bound to keep down the interest of mortgages. The true principle upon which a tenant in tail has been considered entitled to do whatever a tenant in fee could do, was, that, although he had not the fee simple, he might acquire it whenever he chose; and that the remainderman (as Sir T. Plumer expresses it) was at his mercy; (see also 1 *Ves. Sen.* 480); and the Vice-Chancellor, Sir W. P. Wood, in *Turner v. Wright*, says: "The tenant in tail (even if it be special tail) can suffer a recovery, and make the estate his own. Therefore, the Court will not interfere with his rights of ownership." (*Johnson*, 752.) If so, a tenant in tail who cannot suffer a recovery (or do what is now equivalent), and cannot make the estate his own, ought not to be put on the same footing as one who can. Sir Thomas Plumer's determination, against the infant, seems to have been based, partly, upon the opinion of Lord Hardwicke, in opposition to Lord Talbot (see particularly 1 *Ves. Sen.* 480),

and, partly, upon the fact, that an infant's recovery by privy seal was discretionary in the Judges, and, in practice, disused, although its potentiality remained. (See a note in Turn. & Russ. p. 176, showing that it was then still (1823) the law of the land; referring to *Doe v. Rawding*, 2 B. & A. 441.)

In *Hussey v. Hussey*, in 1820, before Sir John Leach (5 Mad. 44), an infant plaintiff was tenant in tail in possession of one estate, and tenant in fee in remainder of another estate, expectant on the death of his mother, who was tenant for life, impeachable of waste. A petition was presented, on behalf of the infant, for an inquiry, what timber was proper to be cut on both estates. It does not appear whether any other party was represented on the application. Sir John Leach said that, as to the estate of which the plaintiff was tenant in tail in possession, the Court would authorise the cutting of all timber fit and proper to be felled in a due course of management; but, as to the other estate, the Court could only authorise the cutting of such timber as was decaying, or injured the growth of other trees. His Honour's observation seems to admit the infant plaintiff's right to the timber on the entailed estate, but yet to impose some restraint upon the exercise of that right.

To these cases should be added, a reference to that of *Ferrand v. Wilson*, in 1845 (4 Hare, 344), where V.-C. Wigram assumed that an infant tenant in tail would be entitled, through his guardian, to cut timber, in the ordinary course, as part of the rents and profits of the estate; but the rights of an infant, in that respect, were not in question in that cause.

The argument, against the infant tenant in tail, is stronger now, than it was in Sir Thomas Plumer's days; for there can be no doubt that an adult person only is capable of making a disentailing deed under the statute of 1833.

It may be said that a tenant in tail after possibility of issue extinct is allowed to commit legal waste, (although

not equitable waste), notwithstanding he cannot bar the remainders; but this appears, from what has been before shown, to be a peculiar privilege, applicable to this estate as the "remnant and residue" of an estate tail *with* possibility. In the *Duke of Marlborough's Case*, (3 Mad. 498), Sir John Leach seems, certainly, to have thought, that if the Duke was tenant in tail, the circumstance that he was restrained, by statute, from alienation, would not prevent his committing the equitable waste which a tenant in tail generally might commit; but His Honour, upon further reflection, decided that, in that case, the Duke's obligation to keep up the house of Blenheim prevented his cutting timber, which served as an ornament or shelter to it; and therefore, there was, in fact, no determination upon the other point.

If it should be thought that an infant tenant in tail may commit waste generally, there will, still, be the question, whether he is not as much liable to be restrained from equitable waste, as we have seen that a tenant in tail after possibility is, or as we shall see that a tenant in fee subject to an executory devise over is; (*Turner v. Wright, ubi supra et infra*).

It is no objection to the argument, against the right of an infant tenant in tail in possession, or his guardian, to commit waste, that if waste is unlawfully committed by a tenant for life in possession, precedent to an estate tail vested in an infant, the infant will be entitled to the property in the waste, because he is owner of the first existing estate of inheritance; for the right of the infant, in such a case, is an accident, arising from the necessity, at law, of there being some one in whom the waste may vest, and who may immediately sue for it. By the general rule of law, that person must be the owner of the first vested estate of inheritance for the time being.

A little consideration will show that flagrant abuses, without redress, may easily be made, of the right of an infant tenant in tail to commit waste. He may be a sickly, or even

a sinking, child, with his father for his guardian; or if his father be dead, his mother, without brother or sister; in either of which cases, his whole personal estate will pass, on his death, to his guardian, as his administrator and sole next of kin. The evil is much greater than if he were tenant in fee; for, in that case, an abuse of the guardian's power, by converting real estate into personal, for his own benefit, by felling timber, will be redressed, by compelling him to refund the ill-gotten gain for the benefit of the inheritance; as may be seen in the case of *Tullit v. Tullit*, reported in Dickens, 322; S. C. Amb. 370, Blunt's Edit. & notes; but, in the case of an infant tenant in tail, if his right to commit waste, through his guardian, be admitted, there can be no such redress. Sir Thomas Clarke, in *Tullit v. Tullit*, well puts the case of an infant tenant in fee, of a year old, and likely to die, having a guardian, who will be entitled, on his death, to his personal estate, or a distributive share of it, and who yet might cut down 10,000*l.* worth of timber on his estate, and thus turn realty into personalty for his own benefit. This supposed case is still more in point, with reference to the instance of an infant tenant in tail.

CHAPTER IV.

RIGHTS BETWEEN DEFEASIBLE AND EXECUTORY TENANTS IN FEE.

UNLESS the appeal in the very recent case of *Turner v. Wright*, 1860 (2 De G. F. & J. 234), is to be considered to have been decided upon general principles, as well as on the particular terms of a will, it is still a question not free from doubt, whether a tenant in fee, whose estate is subject to an executory devise over, is entitled to commit legal waste, either in timber trees or otherwise. In that case, the V.-C. Wood (see Johns. 740) felt no difficulty in restraining him from doing equitable waste in trees; and the ground upon which his Honour declined to restrain legal waste, was, that the first limitation over, after the defeasible fee, was for an estate for life without impeachment of waste, which seemed to show that the testator contemplated the exercise of the usual rights of legal ownership, by all the persons to whom the property was destined in succession, whether by way of remainder or executory devise. Upon the general principle, however, independently of such evidence of intention, no decided opinion was expressed or required; but it may be inferred, that the inclination of the Court was against any such restriction. There was, however, authority, upon which it might be, and was, very strongly insisted, that in such a case, legal waste ought to be restrained. In *Robinson v. Litton*, before Lord Hardwicke, in the year 1744, reported in several books, and probably not with complete accuracy in any one (see 3 Atk. 209; 6 Cruise, Dig. 427; Vin. Ab. Dev. 475), there was a devise to an infant son in fee, subject to

an executory devise over. Whether it was in the event of his dying under age *and* without issue at his death, *or* under age, *or* without issue at his death, and whether, in the event of his even attaining his age of 21 years, part or even the whole of the property was not to receive a different destination, seems doubtful upon the will, or at least upon the several reports of it ; and it has been supposed (see *Turner v. Wright, suprd*) that the Court must have considered the son as substantially a trustee, or else as having only a chattel interest, or that he could not have been intended to cut timber during his infancy. The Court awarded an injunction to restrain his cutting timber at all ; but Lord Hardwicke's own account of the case, in his written judgment in *Garth v. Cotton* (1 Dick. 183), shows, that he did not consider the decision to have turned upon a supposed trusteeship, or a chattel interest, or the infancy ; but upon the mere ground of the defeasibility of the defendant's fee simple. His words are these : "The case of *Robinson v. Litton* went still further than the Common Law ; that cause was heard in this Court, the 12th December, 1744. There was a devise to the defendant and his heirs ; and if he should die before his age of 21 years, leaving no issue, then to the testator's first, &c., daughters in tail, remainder to the testator's own right heirs ; but if the defendant should live to attain the age of 21 years, then the estate should be sold, and the money to be applied for the benefit of the testator's daughters. The defendant, being under the age of 21 years, began to commit waste ; and the daughters brought their bill in this Court ; and though the defendant had the inheritance in him, in point of law, at the time, yet, by reason of the contingent executory limitation, the Court granted an injunction, and, at the hearing of the cause, after its being fully argued, made that injunction perpetual."

Of this decision, Lord Eldon seems to have expressed his approval, in *Stansfield v. Habergham*, 1804 (10 Ves. 273), where lands were vested by will in a trustee in fee, upon

trust, in the events which had happened, for the heir-at-law of a living person ; the consequence of which was, that the beneficial interest, during that person's life, resulted to the testator's heirs at law ; and an injunction had been obtained, to restrain them from cutting timber, which it was moved to dissolve ; and, after a long argument, and much judicial observation, the motion was refused, upon the ground that "it would be too strong to dissolve the injunction, against so much of understanding and opinion as had prevailed." The understanding and opinion, thus referred to, related, not to such a limited state of facts as that then before the Court ; but to the general question, whether the existence of an executory devise over prevented the present owner of the land, whose estate was subject to be defeated by that devise, from cutting timber. In the particular case itself, the persons claiming a right to cut it, were, in substance, only equitable tenants *pur autre vie*, by operation of the law of resulting trusts ; and it would have been a very strong construction of their interests to invest them with the rights of a tenant for life without impeachment of waste.

Lord St. Leonards has suggested, in his observations upon *Wright v. Atkyns*, in the House of Lords, that there is no instance, in the books, of an adult owner in fee being restrained from cutting timber (Sugd. H. L. 380) ; by which it is, probably, meant, that an adult tenant, even of a defeasible fee simple, has never been restrained, and ought not to be restrained, so far as legal waste is concerned.

The ground, however, upon which, in the case of *Turner v. Wright* itself, the Court restrained equitable waste by such a defeasible tenant in fee, namely, that the testator had evinced an intention that the estate should be enjoyed in succession, in the condition in which he himself left it, and also that a defeasible tenant in fee is, in substance, no more than a tenant for life, seems quite sufficient to make it proper, in principle, that he should be restrained from committing legal

waste also, unless the instrument creating his estate has expressly declared that he may commit such waste, or has shown (by the nature of other limitations, as in *Turner v. Wright*) that such a privilege is intended to be enjoyed by him. A tenant for life, as such, has no power to commit waste. It is only by force of the words "without impeachment of waste," used in creating his estate, that he is allowed to commit it; and if those words be not added, of an equivalent intimation of intention given, his right to commit waste must result from his estate being considered something different from an estate for life.

It is true, that a tenant in tail after possibility of issue extinct has now been decided to be entitled to commit legal waste; but upon technical reasoning only, evidently disapproved by Lord Eldon, as well as by Lord Nottingham before him (*Williams v. Williams*, 15 Vesey 419; *Abrahall v. Bubb*, 2 Swanst. 172, n.), and the ground upon which that privilege was attributed to him was a regard to "the inheritance which once was in him" (see *Lewis Bowles's Case*, 11 Co. 79 b.). That inheritance would have enabled him, and, if in possession, at the time, did enable him, to bar the remainders over, and acquire the fee simple; but this cannot be said of a tenant in fee, whose estate is subject to an executory devise over. Substantially, he is nothing more than a tenant for life, with reference to those who may become entitled upon the defeasance of his estate in fee.

As regards the case of *Wright v. Atkyns* itself, although rights to cut timber were discussed, the real question was, what was the quantity of estate or interest taken by Mrs. *Atkyns*; and the timber was cut for the purpose only of raising that question; and the great differences of judicial opinion, which existed, were not upon the law regulating rights to timber, but upon the effect of the limitations in the will then in question (see *Turn & Russ.* 143; *Sugd. H. L.* 384; *11 C. & Fin.* 538, n.; *55 Lds. Journ.* 589, 844).

The case of *Turner v. Wright* was affirmed, upon both points, by Lord Campbell, upon appeal (2 De G. F. & J. 234). His lordship concurred in the opinion that the language of the will showed that the defeasible tenant in fee was not to have less powers than the substituted tenant for life ; and he thought the analogy sufficiently close between the case before him and that of a tenant in tail after possibility of issue extinct, who was allowed to commit legal waste by reason of the inheritance which was once in him, but was liable to be restrained from doing equitable waste. His Lordship seems to have been not much disposed to entertain doubts about the right of any defeasible tenant in fee to commit legal waste, and also to have thought that the case of *Robinson v. Litton* did not really bear upon the question ; but, as regards tenants in tail after possibility, his authority may be cited, as showing, that the right to cut timber depends (as we have before intimated) upon the question of fact, whether the inheritance in possession was once in him, in the sense in which that expression was understood by Lord Eldon, and probably by Lord Coke.

In *Blake v. Peters*, before V.-C. Kindersley and the Lords Justices in 1862 and 1863 (31 Law Journ. (Chy.) 884 ; 32 Law Journ. (Chy.) 200 ; 9 Jur. N. S. 636 ; 1 D. J. & S. 345), a will declared that a person made tenant in fee, subject to an executory devise over, if he should not leave male issue at his death, should not cut timber except for repairs ; and that if he did, his estate should be forfeited. He did cut timber, not for repairs ; and afterwards, upon his death, the executory devise took effect. Upon a bill to make his assets liable for the value of the timber thus cut, it was objected, first, that the restriction was void, as being inconsistent with his estate ; and, secondly, that forfeiture, and not liability, was the only consequence of infringing it. Both objections were overruled, and his assets were made accountable.

CHAPTER V.

RIGHTS BETWEEN CO-OWNERS IN JOINT-TENANCY AND IN COMMON.

THE authorities make no distinction between joint-tenants and tenants in common, as regards their rights to timber and other trees upon the lands held in joint-tenancy or in common. The decided cases seem to relate, specifically, to tenancies in common ; but the language of them treats cases of joint-tenancy as identical with themselves.

By the Statute of Westminster the 2nd, 13 Edw. I. c. 22 (F. N. B. 59 d), a writ of waste was given to one tenant in common against his companions ; but that writ is abolished, in this and all other cases (3 & 4 Wm. IV. c. 27).

The principle of law, assumed, in disposing of disputes between co-tenants, otherwise than in the old action of waste, is, that each of them is equally entitled with his fellows to the enjoyment of the trees, and to the exercise of acts of ownership over them ; but with this qualification, that if the emolument, derived by one, is greater than that proportionate share to which his interest in the land entitles him, he must account for, and pay over to his fellows, whatever excess he may so have received.

Upon this principle, the Court of Chancery has refused to restrain a tenant in common from cutting timber-trees upon the land, unless (1.), he appeared to be incapable of paying to his fellows the excess of their value beyond his own share ; or (2.) he was committing destruction ; or (3.) he had become occupying tenant to his fellows at a rent.

Thus, in *Goodwyn v. Spray*, in 1786 (2 Dick. 667), an in-

junction against cutting timber was applied for, *ex parte*, as between one tenant in common and another, and was, at the first, granted by Lord Thurlow, but was afterwards countermanded by him, upon reconsideration, before it was drawn up; and in *Smallman v. Onions*, before the same Judge, in 1792 (3 B. C. C. 620), where an injunction was applied for by parties entitled to two-thirds of the produce of the sale of an estate held by trustees for sale, against the person entitled to the other one-third, who had got into possession, the injunction was, at first, refused, by Lord Thurlow, upon recollection of *Goodwyn v. Spray*, but was afterwards granted, upon the ground, appearing in the affidavits, that the defendant was not able to pay to the plaintiffs their shares of the produce of the sale of the timber. This case, however, appears also to have been an *ex parte* determination only.

In the case of *Martyn v. Knowllys*, in the King's Bench, in 1799 (8 T. R. 145), one tenant in common brought an action on the case, in the nature of waste, against his companion, who had taken a lease from him of his moiety. The acts proved were, the felling of many trees (probably timber), all of which were of a proper age to be cut; and the plaintiff had a verdict for half the value of the trees; but the full Court, through Lord Kenyon, C. J., decided, that the action would not lie; and, also, that it would not lie, if there had been no demise by one tenant in common to another; for although one tenant in common, who misuses the land, is answerable to the other, in an action for misfeasance, yet, here, what was done was not like waste; no injury was done to the inheritance; no timber was improperly felled; and if this action succeeded, it would enable one tenant in common to prevent the others taking the fair profit of their estate; but his Lordship added, that, in another form of action, the plaintiff would be entitled to recover a moiety of the value of the trees that were cut.

In *Hole v. Thomas*, before Lord Eldon, in 1802 (7 Ves.

589), which was also an *ex parte* application, one tenant in common (probably in possession) had cut coppice wood, in May and June, an improper season; and had cut twenty oaks in June, which was also an improper season as to them, and had cut them at one-third of their growth; and had also cut, and was cutting, fir-trees, and intended to cut beech-trees, both of which were in the park and avenues, and were ornamental, and a shelter to the house, and the cutting of which would be an irreparable injury. Upon this, Lord Eldon said he never knew an instance of an application to stay waste by one tenant in common against another; one tenant in common having a right to enjoy as he pleases; that the principle, in the case of tenant for life, was, that he is to take according to the will of the testator or grantor; that a case of malicious destruction might be a ground; but that a great part of the subject of the present motion was pure equitable waste; that he would grant an injunction to restrain cutting saplings, timber-trees, or underwood, at unseasonable times, until answer or further order, for that was destruction: and it was ordered accordingly.

Twort v. Twort, in 1809, before Lord Eldon (16 Ves. 128), was a bill for a partition, by one tenant in common against two others. It prayed also an injunction against cutting timber, and ploughing up ancient meadow. One of the defendants was in possession, by the consent of the plaintiff and the other defendant, under an agreement or understanding to pay 12*l.* 10*s.* per annum for the plaintiff's share, which he had paid, in fact, for some time. Upon the injunction being moved for, Lord Eldon mentioned *Goodwyn v. Spray*, as to the timber, and said that there were subsequent cases, taking this distinction, that if one tenant in common is doing merely what any other (co-) owner of (the) land might do, the other cannot have an injunction, merely on the ground that he does not choose to do so; but that if it amounts to destruction, the Court will interfere.

The motion appears to have been opposed, so far as to refer to the case of *Smallman v. Onions* (*suprd*), as having been decided on the special ground of insolvency: and then Lord Eldon said, that his present opinion was, that if one tenant in common thought proper, by agreement with the other, to hold the premises as an occupying tenant, the effect of that contract being to exclude the other from entry for any purpose, the (occupying co-) tenant has thereby prohibited any act by himself but such as an occupying tenant might do; that he should, therefore, grant the injunction, as to the meadow land; but not as to the other object (meaning the timber), unless, upon looking into authorities, he could see a ground for it, upon the old statutes which had been mentioned, viz., Gloucester, and Westminster 2nd.

Upon a subsequent occasion, there seems to have been much discussion between the plaintiff's counsel and Lord Eldon; and an anonymous case in *Moor* (p. 71) was cited; and, ultimately, an injunction against cutting timber was granted, upon the same principle as the restraint against ploughing ancient meadow; the order stating, expressly, that the defendant is occupying tenant to the plaintiff, and restraining him from committing any waste upon the premises which he held as such occupying tenant. *Martyn v. Knowllys* was not cited.

CHAPTER VI.

RIGHTS BETWEEN MORTGAGEE AND MORTGAGOR.

THE mortgagee, in possession, will be restrained from cutting timber on the mortgaged estate, unless the security is deficient for payment of the mortgage money. See *Witherington v. Banks*, Mr. Baron Price for L. C. 1725, Sel. Ca. Chy. 31; and see notes in Macnaghten's Ed. *ibid*.

It seems well settled now, that a mortgagor in possession will not be restrained from cutting timber, unless the security is deficient; see *Humphreys v. Harrison*, May, 1820 (1 J. & W. 581); *Hippesley v. Spencer*, Nov. 1820 (5 Mad. 422); *King v. Smith*, 1843 (2 Hare, 239).

Even if the security be deficient, the mortgagor in possession will be allowed to cut underwood, if he does not cut it in a manner contrary to the usual course of husbandry; because underwood is always considered as a crop. See *Humphreys v. Harrison*, by Lord Eldon (*supra*).

These rules seem, clearly, to be consistent with the principle of the Court of Chancery, that the mortgaged estate continues the property of the mortgagor, even although the mortgagee have taken possession of it, until either the equity of redemption shall have been foreclosed, or the estate itself shall have been sold.

CHAPTER VII.

RIGHTS BETWEEN LORD OF MANOR AND COPYHOLDERS.

THE rights to timber and trees, between the lord and the copyholder, are pretty much the same as between lessor and lessee, except that they are of a permanent instead of a temporary character, and are regulated by customs of immemorial existence and perpetual duration; unless in the very unusual instance of a deed between the lord and the copyholders. If there be such a deed, the reciprocal rights of the lord and his tenants may be regulated by it, from generation to generation. See such an instance in *Blackett, Bt.*, v. *Lowes*, 1814 (2 M. & S. 494), where such a deed had stipulated that the copyholder might cut timber for repairs; and it appeared that the timber which a copyholder had actually cut was not wanted for repairs; whereupon the lord was held entitled to bring trover for it.

The circumstance that the lord's usual remedy for waste, against the copyhold tenant, is forfeiture of the tenement itself (and not of the place wasted only, see 1 Watk. Cop. by Cov. 407), makes the tenant's obligation to abstain from all waste a very serious one; and it can very seldom be perfectly safe for a tenant to cut timber, even where the custom allows it to be cut for repairs, unless he has the licence of the lord, or the assignment of the bailiff; and, without such a custom, it would not be safe to cut any timber-trees at all, or even to lop them, or otherwise deal with them; for, although almost every manor has particular customs, which give rights, equivalent to those which the common law gives to lessees for

years, yet there seems to be no general custom or law, regulating all copyholds, as regards "estovers," or "botes," similar to that which obtains, by common law, in favour of lessees; and it is to be borne in mind that, in strictness, copyholders are only tenants at will to the lord. See the general subject in 1 Scriven on Copyholds, by Stalman, 419, 424; 1 Watk. Cop. by Coventry, 399 et seq.; 1 Cru. Dig. 323 et seq.

There was, formerly, some authority for the opinion that the lord might, by general custom, cut timber for his own use, upon the copyhold tenements, if he left a reasonable quantity for botes and estovers for the tenants; but, upon this question coming before the Court of Chancery, in a bill for an injunction by a tenant of the manor of Elsworth, in Cambridgeshire, in the case *Whitechurch v. Holworthy*, doubts were expressed, and a case was sent for the opinion of the Court of King's Bench, who certified, in 1815, that the lord had no such right, unless by special custom. (See 19 Ves. 213; 4 M. & S. 340.) This opinion is understood to have established the rule, that in the absence of special custom, timber cannot be cut, either by lord or by tenant, without the agreement of both. See Scriven (*ubi suprd.*).

It was, at one time, held, that the lord could not have an injunction in Chancery against his tenant, to restrain waste in cutting timber; but that he must be left to his remedy by forfeiture; see *Dench v. Bampton* (4 Ves. 700), by Lord Rosslyn; but this doctrine was overruled by Lord Eldon, in 1807, in *Richards v. Noble* (3 Mer. 673, Appx.), where he said that, in many cases, forfeiture was a very inadequate remedy; and he put the case of a barren spot upon which many valuable timber-trees grew.

Mr. Sergeant Scriven seems to have thought (1 Scriv. Cop. 423 n., 4th Edit. by Stalman) that a copyholder had no right to cut down any trees at all, whether timber or not, or that, at all events, they would, if cut, belong to his lord; and that this was a necessary consequence of the base character of his

tenancy, as being originally a tenancy at will, although now holding, not simply at will, but also according to the custom of the manor; but if the question be raised by a proceeding for a forfeiture, it is presumed it would be, whether the cutting of the trees was an act of legal waste, upon ordinary principles, as between landlord and tenant.

In *Denn dem. Jodrell v. Johnson*, in 1808 (10 East, 266), the Court of King's Bench decided that if there be a custom in a manor that a copyholder in fee may cut timber, it will not be a ground of forfeiture that a tenant for life claiming under the will of such copyholder, cuts timber. In that case, the will declared that the tenant for life should be without impeachment of waste; but, of course, this could not give him any additional rights, as against the lord, although it might, as between himself and the remainderman.

If the lord plants trees on the waste, the commoners may not cut them down, even if the right of common be injured by their presence; but must bring their action for the injury, if any. *Sadgrove v. Kirby*, and *è contrà*, in error, (6 T. R. 483, and 1 B. & P. 13; 1797). May the lord cut down all the trees on the waste, whether planted by him or not? This is a question of great interest in the case of commons near a great town, which are often ornamentally planted. It seems that he may; at least, without any right of interference by any tenant of the manor, whether freehold or copyhold; unless the trees are protected by the existence of a right of common of estovers, extending over the waste. Such a right of common of estovers seems to prevent the lord's approving, that is, enclosing and appropriating, any part of the waste. See 2 Inst. 87, and see the rule stated in *Fawcett v. Strickland* (Willes, 57, Comyn, 578), and in *Grant v. Gunner* (1 Taunt. 435). This must be upon the ground that the commoners are entitled to have the trees preserved.

Estovers, which are defined as being synonymous with botes (see 2 Bl. Com. 35), may probably be taken, if desired,

not only from timber-trees, but from anytrees which may suit the purpose of the botes required, which may be house bote, hedge bote, plough bote, or fire bote; and if so, the effect must be, that all trees will be protected from the lord's appropriation of them, unless the right of common of estovers is limited to timber-trees, or some other trees, only. In the absence, however, of a custom, giving a right of common of estovers over the waste, it would seem that all trees, of every kind, upon it, may be cut by the lord. The existence of a common of pasture does not appear to carry any right to have the trees preserved for the sake of shade for the cattle of the commoners. The only right involved in a common of pasture seems to be that of taking the herbage by the mouths of the cattle; see *Horsey v. Hagberton*, Cro. Jac. 229.

A person contingently entitled to the next presentation may sue as patron Strooby v. Fryer 8 Q. 417.

CHAPTER VIII.

RIGHTS BETWEEN PATRON AND INCUMBENT.

By the statute or ordinance of 35 Edw. I. st. 2, "Ne rector prosternat arbores in cœmeterio,"—which Lord Coke says (11 Co. 49), affirmed the common law—trees in the churchyard must not be cut, unless the chancel needs repair; and they must not be applied in any other manner, unless the rector, of his charity, shall think fit to allow part of them to the parishioners, to be used in repairing the body of the church.

In *Strachy v. Francis*, 1741 (2 Atk. 217), where a patron moved for an injunction against the rector, to restrain cutting timber in the churchyard, Lord Hardwicke laid down the law thus: "A rector may cut down timber for the repairs of the parsonage house, or the chancel, but not to any common purpose; and this he may be justified in doing, under the statute 35 Edw. I., intituled 'Ne rector prosternat arbores in cœmeterio.' If it is the custom of the country, he may cut down underwood for any purpose; but if he grubs it up, it will be waste. He may cut down timber, likewise, for repairing any old pews that belong to the rectory; and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage." Accordingly, the rector was restrained from cutting timber, except in the particular instances thus mentioned.

In *Knight v. Moseley*, about 1753, stated somewhat loosely by Ambler (1 Amb. 176, see Blunt's ed.), a bill was filed by a patron, to restrain a rector from digging stone on the glebe

lands, and for an account of the stone gotten; and Lord Hardwicke overruled a demurrer to it, observing, however, that if the demurrer had been only to the account, it might have been proper, as the patron could have no benefit from the living; but, in this case, his Lordship is reported to have said, incidentally, that parsons have been "indulged" in selling timber cut for repairs, and applying the money so produced in making the repairs needed. Lord Eldon quotes this passage in the case of *Wither v. Dean and Chapter of Winchester* (3 Mer. 421); but with evident hesitation as to the accuracy of the report; and another note of the judgment has since been printed, from Mr. Hargrave's MSS., by Mr. Blunt, in his *Ambler*, in which this passage does not appear.

Ordinary scumple
may prevent
collusion between
patron and
parson
Holden v Weeks
12 H 278

In the *Duke of Marlborough v. St. John*, before V.-C. Parker, 1852 (5. D. & S. 174), his Honor granted an injunction, at the suit of the patron, against the Rector of Bladon-cum-Woodstock, to restrain, in very particular terms, the cutting of timber on the glebe, except for the specific purpose of repairs to the rectory-house or buildings; and he expressed doubt as to the accuracy of the report of Lord Hardwicke's supposed expressions in favour of the right of ecclesiastical persons to sell timber; and he considered, that if Lord Eldon had adopted them at all, it was with reference to a Dean and Chapter wanting all their timber to repair their cathedral; and he adverted to *Strachy v. Francis*, as showing that Lord Hardwicke there treated a rector as having only the rights of a tenant for life. This view is important; because, if he is to be treated only as tenant for life, he must be restrained from cutting trees planted, or left, for ornament or shelter, whether timber or not. As to trees which are neither timber, nor planted or left for ornament or shelter, he may, probably, fell and convert them, if he be willing to incur the odium of doing so.

Although the statute "*Ne rector prosternat*," &c., speaks of

trees generally (arbores), it would probably be held to mean timber-trees.

The rights of a vicar will, probably, be considered, as not usually extending to cut timber-trees in the churchyard at all; because they are legally devoted to the repair of the chancel, and the chancel must be maintained, not by the vicar, but by the impropriate-rector, as much as by the spiritual rector.^o The glebe will, in most cases, be part of the rectory impropriate, wherever the spiritual benefice is a vicarage, and, if so, the legal possession of it will not be in the vicar; but in those cases in which the vicar is seised of any glebe land, and is charged, also, with the maintenance of a residence-house or other buildings, he would, probably, be justified in cutting timber from the glebe, for the purposes of repairs, to the extent to which an incumbent-rector might do it. As to the restrictions, before-mentioned, as attaching to a tenant for life, they certainly apply, with not less force, to a vicar, than to a rector.

The principles applicable to a vicar will probably be sufficient to determine the rights and obligations of a perpetual curate, in those cases in which the freehold of the churchyard or glebe may be vested in him, either by reason of the augmentation of his living under the Acts regulating Queen Anne's Bounty, or by the operation of the General Church Building Acts, which, in many instances, vest the freehold of the churchyard in the incumbent as perpetual curate; except that, as to the repairs of churches built under the General Church Building Acts, no distinction is made between the chancel, if any, and the body of the church; and that, either a repair fund is provided, or else the repairs are to be done by voluntary contributions, or by a rate. It, therefore, would not be safe, for the incumbent of a church built under these Acts, to cut down any timber-trees in the churchyard,—at least, without the consent of both patron and ordinary. As to trees, which are not of the nature of timber, and have not been

planted or left standing for ornament or shelter, it is presumed he may cut them, without being liable to the charge of waste; but, as to those planted, or left standing, for ornament or shelter, there seems no reason why he should be allowed to cut them, any more than any tenant for life would be.

With regard to prebendaries, a case occurred, in the year 1630, in which a patron of a prebend, of which the property appears to have been in Devonshire, obtained an injunction in Chancery, against the prebendary, to restrain any waste or spoil upon the houses, lands, woods, or trees of the prebend: *Acland v. Atwell* (2 Roll. Ab. 813, 3 Swanst. 499, n.).

In modern times, the individual corporate character of prebendaries, and the separate nature of their prebendal properties, have submitted to the extinguishing operation of the Ecclesiastical Reform Acts.

Can parson with consent of nation and ordinary fell timber generally?
Holden v. Weekes 1 Ja H 278

CHAPTER IX.

RIGHTS BETWEEN THE CROWN AND DEANS AND CHAPTERS.

THE modern understanding of the law on this subject will be found in the cases of *Wither v. Dean and Chapter of Winchester*, 1817, before Lord Eldon (3 Mer. 421), and *Herring v. Dean and Chapter of St. Paul's*, 1819, before Sir T. Plumer, M.R. (3 Swanst. 492). In the former of these cases, the plaintiff was a lessee of the Dean and Chapter, and sought to restrain them from cutting timber of an ornamental character upon certain lands, upon which it was provided, by the lease, that they should not cut it, unless wanted for the repairs of their cathedral church. The trees, however, were reserved, by the lease, to the lessors, subject to the provision just mentioned. It was a controverted question, whether the trees, sought to be protected, did or did not stand on the privileged lands; but, assuming that they did, the case of the Dean and Chapter was, that all the timber on the estate would be less than was wanted for the repairs of the cathedral; while, on the other hand, the lessee said, that their agents had offered to spare the trees if he (the lessee) was willing to pay for their value; which showed, as he insisted, that they were not intended for repairs. Upon the whole, the Lord Chancellor refused to prevent the trees being cut; and, apparently, considered the fact, that the cathedral repairs required all the timber on the estate, enough to deprive these trees of the conditional protection of the lease, and that the plaintiff

had no right to complain of the ultimate use made of them, being, in that respect, what had been called "an uninterested stranger." He stated the general principle, that timber on ecclesiastical bodies' estates was to be preserved, as a fund for the maintenance of the church; and that Deans and Chapters were liable, in this respect, to restraint, at the suit of the Attorney-General; and he adverted to Lord Hardwicke's supposed dictum, that such bodies had been "indulged" in selling their timber; and, although doubting the accuracy of the report, he suggested the convenience of such an indulgence, to prevent bringing the specific timber from distant places.

In *Herring v. Dean and Chapter of St. Paul's*, the case was, that the Dean and Chapter had made a lease of lands, and of woods, groves, hedgerows, and springs, with certain rights of cutting wood, and had then themselves cut down timber on the demised property, during the lease, and had converted the produce to their own use; and the lessee brought his bill for an account and payment of the value of that timber, upon the assumption that the terms of his lease entitled him to cut it himself, and, consequently, to insist upon the produce of it, if cut by the lessors. The bill was dismissed by Sir T. Plumer, upon three grounds, viz., 1st. That the Dean and Chapter had themselves no right to cut timber for their own use, because it ought to be preserved as a fund for the maintenance of the church. 2nd. That if they had such a right, they had not, in fact, transferred it, by the lease, to the plaintiff. 3rdly. That such a transaction would not be fit for a Court of Equity to enforce.

Although the obligations of Deans and Chapters, to apply their timber for the repairs of their cathedral church, are such as the cases just mentioned indicate, it is most likely that, in practice, they have dealt with it as they pleased; for they seem liable to no legal control in so doing, except by the Crown, on the information of the Attorney-General; and it is

highly improbable that he would know of their falls of timber, or their sales of it. Any division of the produce, amongst the members of the Chapter for the time being, might, possibly, be redressed by the Visitor, if brought to his attention.

* This dictum is explained by James V.C. in Sawyer & Tiger 8 Eqh 422 as limited to selling the timber cut miles off from where it is wanted.

CHAPTER X.

RIGHTS BETWEEN CROWN AND BISHOP.

LORD COKE (in *Liford's Case*, at 11 Co. 49, a) quotes this case, from the Parliamentary Roll, of a petition made to King Edw. I., at the parliament held at Carlisle, in 35 Edw. I., 1307, in these terms :—" Will our lord the king understand, that Sir Anthony, Bishop of Durham, wastes and destroys all the wood appertaining to his church and the bishopric of Durham, by giving, and selling, and ill-keeping, and by erecting forges of iron and lead, and burning of coals, &c. ; wherefore if our lord the King, who is patron of the church, puts not remedy thereto, the church aforesaid will be disinherited and impoverished, in prejudice of our lord the King in his crown, and of the chapter of Durham :—*Ita responsum est ; inhibeatur, per breve de Cancellar', Episcopo et ministr' suis, ne faciant vastum de content' in petit'* ; by which [Lord Coke says] it appears, that the parliament referred it to the ordinary remedy of the common law, by writ of prohibition, in such case."

Lord Coke adds : If a bishop or archdeacon abates or fells all the wood that he has as bishop, he shall be deposed, as a dilapidator of his house (49, b).

It seems to have been understood, as early as the year 1629, that if a bishop was doing, or intending to do, waste or spoil in wood, he would be restrained, by prohibition, at the suit of the Crown ; and, upon that express ground, an injunction was awarded by the Court of Chancery to restrain waste by a bishop's lessee, although his lease was expressly made

without impeachment of waste : *Bishop of Winchester v. Woolgar* (3 Swanst. 493, *et seq.* in notes).

In *Jefferson v. Bishop of Durham*, 1797 (1 B. & P. 105), the liability of a bishop to be restrained, at the suit of the Crown, from doing waste, was much discussed, and was admitted by the Court ; but it was there decided, that the Court itself (Common Pleas) had no right to issue a writ of prohibition, for that purpose ; and, still less, at the instance of a person having no interest in the subject matter, which was the case there.

In *Wither v. Dean and Chapter of Winchester*, and *Herring v. Dean and Chapter of St. Paul's*,^{3 Inst. 421} the right of the Crown, to restrain waste in a bishop, was alluded to, as clear. See also 11 Co. 49, b. So, also, Lord Hardwicke, in *Knight v. Mosely* (Ambl. 176), speaks of injunctions having been granted to stay waste, at the instance of the Attorney-General, on behalf of the Crown, the patron of bishops. ^{2 Samuel 492}

It seems that, under the Ecclesiastical Revenues Act of 1860, bishops are still to be holders of lands, as endowments of their sees, whenever they so think fit, as well as occupiers of the palaces, gardens, and pleasure-grounds belonging to them. Their rights, seem to be those of tenants for life, subject to impeachment for waste of the ordinary kind.

CHAPTER XI.

RIGHTS AS TO CHARITY LANDS.

THE timber-trees upon charity lands must, as much, be considered, part of the capital of those lands, as the timber on chapter lands would be ; and applicable, accordingly, to repair of buildings ; and if cuttings should be necessary, to prevent decay, while repairs are unneeded, the produce of the sale of such cuttings should be invested, as a capital fund for the maintenance of the property and the use of the charity. All this may be done under the direction of the Charity Commissioners, or, in important and difficult cases, of the Court of Chancery.

CHAPTER XII.

RIGHTS BETWEEN REAL AND PERSONAL REPRESENTATIVES.

SECT. 1.—*In case of Tenant in Fee.*

It seems quite clear that if a tenant in fee cuts timber and sells it, the purchase-money, whether received in his lifetime or not, is part of his personal estate; and that the same result would follow from his sale of standing timber, which was not cut in his lifetime; for a binding contract to sell the land itself would convert it into personal estate from that time, and such a contract to sell a part of the land must have the same effect. Timber is, certainly, part of the land, and would pass with it.

SECT. 2.—*In case of Tenant in Tail.*

If a tenant in tail in possession cuts timber or other trees, and sells them, the purchase-money, whether received in his lifetime or not, and the trees themselves, if not sold, would be part of his personal estate; but it is apprehended that if he were to sell the timber or other trees in a standing state, and then to die before they were cut, they could not be cut down, either by his executors or by the purchaser; but that they must pass to the remainderman in tail, or even to the issue in tail, as part of the entailed estate itself. This is so laid down in 11 Co. 50, a, where it is said that timber-trees cannot be felled with a goose-quill.

*Brooke & Co. v. Curdell, Bargain & Sale
(26) 4000 Wast 13 Chancery & Pexson
3 Bligh at 1/1 211*

SECT. 3.—*In case of Tenant for Life.*

So, if a tenant for life, without impeachment of waste, were

to cut timber or other trees, and sell them, the trees, or their produce, would be part of his personal estate from the time of the cutting; but if he sold them in a standing state, and died before they were cut, they could not be cut by his executors, or by the purchaser. See the distinction, in this respect, between the tenant for life without impeachment of waste and tenant in fee, pointed out by Lord Campbell, C. in *Turner v. Wright* (2 D. F. & J. 234), by way of correction of an observation attributed to the Judge below.

SECT. 4.—*In case of Infants.*

In *Tullit v. Tullit*, before Sir Thomas Clarke, M. R., in 1759 (1 Ambl. 370, Edit. Blunt; 1 Dick. 322), timber to a large extent had been cut down, on the estate of an infant tenant in fee, by his mother, who was his guardian. She applied the produce to her own use, and the infant died under age and intestate; whereupon his cousin and heir, who was also an infant, brought a bill against the mother, to oblige her to refund the price of the timber, as realty. The mother, by her answer, stated that she intended to place the money out at interest for the benefit of the infant, if he had lived. The decree declared that the timber cut down should be considered as real estate; and an account of it was ordered to be taken against the mother, with a direction that the amount should be paid into Court, and invested for the benefit of the infant plaintiff; with a provision, that if he should die under age, the money should be considered, and go in succession, as his real estate. According to the report of this case in Ambler, it appears as if the decision had been made merely upon the authority of a case of *Mason v. Mason*, 1 Wms. 449 before the Lords Commissioners, in 1724, which was mentioned by Mr. Capper, as *amicus curiæ*, and in which it was said that when there was an opportunity of selling, to Sir Robert Walpole, very advantageously, a large quantity of timber, standing on the estate of an infant tenant in fee, the Court

of Chancery authorised the guardian to sell it, on the terms of the produce being invested, as real estate, for the infant's benefit; but by the report in Dickens, which gives Sir Thomas Clarke's judgment much more fully, it appears that the ground of the decision was, that the mother had abused her powers of cutting timber as guardian, with a view to benefiting herself, as one of the infant's next of kin. In consistency with this view, Lord Thurlow, in *Ex parte Bromfield* (see 1 Ves. jun. 462), which was the case of a lunatic, intimates that where a committee, or guardian, is intrusted with the care of an estate, and has abused that trust, with a view of changing the quality of the estate, to serve his own interest, there arises an equity to undo the act, tortious in that way; but he added, that he knew no rule of equity upon a less ground than that.

This seems, also, to have been the way in which Sir L. Shadwell understood the case of *Tullit v. Tullit*; for, in speaking of it (in 5 Simons, 241), he says: "The Court held that no benefit whatever should result to a person who might become the sole next of kin of the infant; but that the money should be reserved for the benefit of the party entitled to the inheritance."

It may, therefore, be presumed, that if timber is cut on the estate of an infant tenant in fee, by his guardian, in the proper husbandlike management of his estate, it thereupon becomes the personal estate of the infant, for the purpose of devolution.

See Field v. Bennet 27 Beauch 40

SECT. 5.—*In case of Lunatics.*

As between the real and personal representatives of a lunatic, it appears that if timber has been cut by the authority of the Crown's jurisdiction in lunacy, or by the committee of the estate, with the subsequent approval of that jurisdiction, the timber, or its produce, will be treated as part

of the personal estate of the lunatic ; but that if it has been applied, under the proper direction, in discharging incumbrances, or even in redemption or purchase of the land-tax, there will be no equity, on the part of those interested in the personal estate, to recall the amount so applied.

The case of *Ex parte Bromfield*, before Lord Thurlow, upon a petition, in 1792 (1 Ves. jun. 453), and the same case, under the name of *Oxenden v. Compton*, before Lord Rosslyn on a bill (2 Ves. jun. 69), shows that the produce of timber cut under the authority of the Crown's jurisdiction in lunacy, founded only on the report of a Master, that the cutting would be for the benefit of the lunatic, is to be treated, after his death, as part of his personal estate. In *Ex parte Phillips*, before Lord Eldon, in 1812 (19 Ves. 118), timber, to the extent of 9455*l.*, had been cut, on the lunatic's estate, under a report that such cutting would be desirable for the payment of his debts ; but, of that sum, as much as 6625*l.* 13*s.* 4*d.* was directed, by an order in lunacy, to be applied in the redemption of land tax, chargeable on his estate. The mode, in which this direction was acted upon, seems not to have, in fact, redeemed the land tax, but rather to have purchased it ; and that was one of the grounds upon which the next of kin insisted, that the tax ought to be considered, to be a charge on the real estate, for their benefit ; but the Lord Chancellor did not seem to think this circumstance material ; and he decided, upon general principles, that the personal estate was not entitled to be recouped ; and he distinguished the cases of infants and lunatics, by showing that, in the case of the former, the Court of Chancery takes care not to alter the nature of the property ; but that, in the case of the latter, the principle is, that they may at any time have lucid intervals ; and the only question is, how it would be best for them to find their property circumstanced, when such an interval occurs.

In *Ex parte Phillips*, Lord Eldon mentioned, in the course

of his judgment, a case which had occurred of a lunatic, seised *ex parte paterna* of Estate A, and *ex parte materna* of Estate B, the latter being subject to a mortgage; and that timber was cut upon A, and applied in discharge of the mortgage upon B; and it was held, upon a question between the heirs [of the two estates], that A was not to be recouped.

In a case before Lord Lyndhurst, in 1830, of *Ex parte Clayton* (1 Russ. & M. 369), the committee of a lunatic tenant in tail had cut timber to the extent of 11,000*l.*, which had been paid into Court. That committee was also the trustee of a private Act of Parliament, by which provision had been made, before the lunacy, for cutting timber upon the estate, and applying the produce in the purchase of other lands. It was a question whether that Act applied to cuttings during life estates only, or during estates tail also; and it was held it applied to the time of life estates only; and, in that view, the 11,000*l.* was allowed to be treated as part of the lunatic's personal estate. Perhaps the cuttings had received the sanction of the Crown's jurisdiction in lunacy, either before or after they were made; but this is not stated: and it does not clearly appear that the remaindermen were represented.

Husband and wife.

Under old law husband seised in his wife's right sells 400 acres for 20 110 day for completion being limited, in the wife's life purchaser caliphoo and pay 200; wife dies, husband not being tenant by curtesy licenters, husband was purchaser for balance and is successful
Becher Contract Baquerin & Gohati 26; otherwise if time limited

for cutting and wife had previously died.
But had in that case the husband been tenant by the curtesy the purchaser could not have cut after the wife's death, for tenant by curtesy is by statute irrevocable of waste. See Good Waste 13.

CHAPTER XIII.

RIGHTS OF PRIVATE OWNERS WITHIN LIMITS OF FORESTS AND CHASES.

THE early Kings of England assumed the right of creating royal forests over whatever lands they thought fit, whether belonging to themselves or to their subjects; but, as regards lands belonging to their subjects, without depriving them of the right of property in the lands themselves; so far as the feudal laws were consistent with property. For this purpose, such lands were brought within the operation of the forest laws, which were, in fact, such arbitrary laws as the King chose, from time to time, to prescribe, or as his Justices in Eyre (when established in the reign of Henry II.) chose to lay down.

The King also assumed the right of creating whatever chases and warrens he thought fit; that is, of granting exclusive rights of hunting and sporting to private persons, extending over the freehold lands of other persons, or of themselves, or both, upon the principle that the original rights of sporting throughout England belonged to the King only, and that no man might sport, even over his own land, without the King's licence. The creation of a chase or warren, however, as distinguished from a forest, did not make it subject to the forest laws, as a whole (2 Bl. Com. 38 and 416); but there were some restrictions which were common to woods in royal forests, and woods in chases and warrens, such as that they could not be enclosed, even for the growth of the underwood, for more than three years after each cutting [see

Stat. 22 Ed. IV., c. 7, Com. Dig. Chase N. 7], and then only with a small ditch and low hedge (8 Co. 138), and that sufficient "vert" (described presently) must always be left, after cutting timber or trees [see Com. Dig. Chase N. 3].

Within a royal forest, a man might not, and, indeed, may not now, cut, on his own land, anything answering the description of "vert," unless with the licence of the Crown; and this forestal right was successfully asserted by the Crown so lately as the years 1847 and 1848, see *Reg. v. Hallett* (16 M. & W. 569, and 1 Excheq. 211), and the Printed Minutes of Evidence on Royal Forests, taken by the House of Commons, in 1848, particularly Mr. Gardiner's.

By "vert," was understood, not only trees, of all kinds, whether timber or not, but also hollies, underwood, bushes, thorns, gorse, and, in short, everything which could afford cover for wild beasts, for deer, or for game; and the penalty for cutting vert in a royal forest, even on a man's own land, was, that the land was seized into the hands of the King, until its owner should pay a fine at the pleasure of the King, or the Forest Judge (Justice in Eyre); the only limitation of which pleasure was one of practice, which established a scale of proportions for offences. (See Com. Dig. Chase N. citing *Manwood*, *passim*.)

So, it is said, that the King, or the owner of a forest, by his officers, may cut "browse wood," for the deer, in winter, "within the wood of any, *infra* regardam forestæ." (*Manwood* 138, cited Com. Dig. Chase N. 5.)

See *Lewis on Forests*, 114 and 125, and notes, as to the effect of "browsing" deer, which means cutting wood, of which the deer eat the bark only, and of which the wood itself becomes, afterwards, the perquisite of the keepers, and thus a temptation to immense waste, of which instances are given. Ash-trees, thorns, and holly seem the favourite cuttings for this purpose, in which other young trees were often incidentally included. Whether the ownership of a "chase" gives

the right to cut browse-wood for deer, may be doubted ; but the injury which the range of deer over the private lands of other persons within a chase may do, both by eating bark and otherwise, may be imagined, upon referring to an Act of 1828 (9 G. IV., c. 14, private), for disfranchising Cranbourne Chase, in Wilts and Dorset ; where it will be seen that the owner of the chase (Lord Rivers) had a right to the run of from 12,000 to 20,000 deer over the lands of a chase ; for the purchase of which right the other landowners gave him 1,800*l.* per annum in fee, to be apportioned on their lands for ever.

There seems some authority for saying that a royal forest, which has been subject to forest laws, may continue to be so, even in the hands of a subject, if granted with the right of Courts of "Justice-Seat." (See the case of *Leicester Forest*, Cro. Jac. 155. See also 4 Inst. 314.)

Although even a tenant in fee simple of lands, within the bounds of a forest, could not, and cannot now, lawfully cut a single tree on the lands, without licence from the Crown, or those deputed by the Crown to give it, it does not seem that the property in trees so cut, whether lawfully or not, vests in the Crown.

It need hardly be mentioned, that killing game in a royal forest was punished in the most terrible manner ; but such horrors are not within the scope of this work. (See Hume's History, temp. Richd. I., and Appx. II.)

The power of creating forests and chases, and the rigour of the forest laws, were abridged by various statutes, and, in particular, by the Charter of the Forest, which was so repeatedly broken by the king, for the time being, that Lord Coke says it was confirmed in parliament more than thirty times (4 Inst. 300, *et seq.*).

By the stat. 9 Hen. III. (1225), *Carta Forestæ*, it was provided that all forests which Hen. II. had afforested should be viewed by good and lawful men, and that if he had made forest of any other wood than of his own demesne, whereby

the owner of the wood had hurt, it should be disafforested; that all woods made forest by Richd. I. and John, [or] until the first coronation of Hen. III., should be disafforested, unless it were the king's demesne wood; that all freeholders, which have their woods in forests shall have their woods as they had them at the first coronation of Hen. II., free from the encroachments subsequently made upon them; that every freeman may "agist," *i. e.* pasture, his own wood within the forest, and take his pannage (acorns, fed by swine), and shall have the honey found in his woods, and may make, in his own wood or land in the forest, mills, springs, pools, marl-pits, dikes, or arable ground, without inclosing it, so that it be not to the annoyance of his neighbours; and that no man from thenceforth should lose either life or member for killing the king's deer.

By 1 Ed. III., st. 2, c. 2, every man, having any wood within the forest, might take house-bote and hay-bote within his own wood, provided he did it by the view of the foresters.

Under the Charter of the Forest, perambulations were made, to separate, from the ancient forests, the additions made to them by Hen. II., Richd. I., or John; and the parts so separated became known, by metes and bounds, by the name of "purlieus," with respect to which it was laid down, that although the owner of land within them might cut his own wood, and improve his own land, without licence, yet that they were disafforested only for the benefit of the owners, and that, as to others, they remained within the forest. (See Com. Dig. Chase I., and Manwood, p. 366.)

By stat. 22 Ed. IV., c. 7 (1482), reciting that divers subjects, having wood, growing in their own soil, in the forest of Rockingham, and other forests and chases in England, or purlieus of the same, who have cut their wood, cannot cope or inclose their soil, to preserve the germ of their wood so cut, longer than for three years, but the germ has been, in time past, and daily is, destroyed by beasts and

cattle [*chatelx*], in the same forests, chases, and purlieus, to the great damage, as well of the said subjects, as of the king's deer, vert, and venison, in their coverts [*coverture*], and otherwise, to the probable destruction of the same forests, chases, and purlieus, it is enacted that, if any of the king's subjects, having wood of his own, growing in his own soil, in any forest, chase, or purlieu of the same, within England, on [or from, "à,"] the first day of the parliament, shall cut, or cause to be cut, the same wood, or part of it, by the licence of the king, or of his heirs, in his forests, chases, or purlieus, or, without licence, in the forest, chase, or purlieu of another person, or make sale of the same wood, it shall be lawful to the same subjects, possessors of the same soil upon which the wood so cut grew, and other such persons to whom the same wood shall have been sold, immediately after the wood so cut, to cope and inclose the same soil, with sufficient hedges to exclude all manner of beasts and cattle [*chatels*] out of the same soil, for the preservation of their germ; and the same hedges so made, the said subjects may [*puissent*] keep continually, for the space of seven years next after the same enclosure, and repair and sustain as need shall require, within the same seven years, without suing any other licence of him or his heirs, or other persons, or any of their officers in the same forests, chases, or purlieus.

This statute was the subject of comment and construction in *Sir F. Barrington's Case* (8 Co. 136, b., affirmed in error, 1 Roll. Rep. 135), where it was held, that it extended only to "several woods," that is, not to woods in which other persons had rights of common; and it was again construed in the recent case of *Dibben v. The Marquis of Anglesey* (2 Cr. & Mee. 722) in 1834, where some doubts of the binding authority of *Barrington's Case* were suggested in argument; but the same interpretation was put upon the statute; and it was also held, that it was permissive only, and that the right to enclose a wood in a chase might be waived by a lease of

lands, with common over the woods ; and, consequently, that an owner of woods within Cranbourne Chase, in Dorsetshire and Wiltshire, (before its disfranchisement by stat. 9 Geo. IV. c. 14, private,) could not, after granting such a lease, insist on a right to enclose the woods for seven years after cutting.

In the time of Charles I., the forest laws were severely put in force, for the sake of exacting fines. The Chief Justice in Eyre [south of Trent, at least, if not also north of Trent] was the Earl of Holland, who held a Court of Justice Seat nearly every year, and, probably, in the same place by adjournments ; although such Courts ought to be held only once in three years. By that Court, very heavy fines were inflicted. (See 2 Hallam's "Constitutional History," p. 14, and Strafford's Letters, there referred to.) The proceedings of a Court thus held, for the Forest of Windsor, in September, 1632, and by adjournment in September, 1633, have been very fully reported by Sir W. Jones, in his Law Reports, p. 266, *et seq.* At that Court, the Earl of Holland was assisted, under the King's orders, by two Common Law Judges, and Noy the Attorney-General : and, amongst the offences committed, will be found to be some for cutting wood, without a licence, on the freeholders' own land. These exactions, and some judicial decisions which countenanced them, led to a statute in 1640 (16 Car. I. c. 16), which, after reciting that, of late, presentments had been made and judgments given, by which the limits of forests had been extended beyond those which had been commonly known for many ages, and that some pretences had been made to set on foot forests where none had been or ought to be, or, at least, had not been used of long time, it was enacted that the limits of forests should be those known as such in the twentieth year of King James, and that all presentments and judgments to the contrary should be void ; and that no place in which no Justice Seat, Swainmote, or

Court of Attachment had been kept, or verderers chosen, or regard made, for sixty years before the first year of the present king, should be deemed forest; and that proper commissions for settling boundaries should issue.

By the statute 57 Geo. III. c. 61 (1817) the offices of Wardens, Chief Justices, and Justices in Eyre of His Majesty's forests, chases, parks, and warrens, north and south of Trent, were prospectively abolished, upon the termination of the respective interests therein; and it was directed, that upon such abolitions taking effect, the duties of the offices should be done by the First Lord Commissioner of Woods and Forests; but this Act was repealed, and, in substance, re-enacted, by a Consolidation Act, relating to the Royal Woods and Forests, passed in the year 1829, (10 Geo. IV. c. 50,) and provisions were made (sect. 100, *et seq.*) for making more effectual the proceedings of the old Forest Court of the Verderers, which ought to be held every forty days; and power was given to them, or any two of them, not only to levy fines of 20*l.* for encroachments, but also to order the abatement of unlawful inclosures, purprestures, encroachments, and trespasses; but if it should be insisted, by the persons proceeded against, that the place in question was not within the boundary of the forest, or within the lands belonging to His Majesty within the same, the verderers were not to proceed to conviction, but were to certify the presentment of the offence to the Attorney-General, to the end that such proceeding might be had therein, by information of intrusion or otherwise, as by law might have been had before the passing of the Act; and nothing was to prevent the Crown from proceeding by information in the Exchequer, or by any other law then existing.

Long before the Act of 1817, the duties of Chief Justice in Eyre had been practically discontinued, except granting licences to sport, and other privileges. It is made matter of complaint, in Mr. Lewis's book, on Forests in general, and the

New Forest in particular, published in 1811, that a disuse of the Court of Justice Seat, for many years, had prevented proper effect being given to its powers, and appeals against the inferior courts being heard, although the salary of the then Chief Justice, south of Trent, the Right Hon. Thomas Grenville, who had held office since 1800, was still kept up, at 3466*l.* 13*s.* 4*d.* per annum, with allowances of venison (pages 20, 25, 39, 95).

The evidence before the Commons' Committee of 1848 shows that the office continued to be held, by the same gentleman, till his death, then recent. It happened in Dec. 1846.

Much evidence on the forestal rights of the Crown, over other men's woods, will be found in the House of Commons' Reports on Royal Forests, in 1848 and 1849. It will be there seen, that the execution of the Act of 1829 (10 Geo. IV.) was very difficult and imperfect; that the rights of the Crown were liable to be much invaded by neglect of the verderers, or by dissensions or jealousies between the verderers themselves, or by collusion on their part, or on the part of freehold or copyhold tenants of manors included within the bounds of a forest; more especially when, as in the case of Waltham Forest, a large part of it was the waste of manors, and the lord of one of those manors set up a custom to grant licences, to his copyhold tenants, to enclose parts of the waste, for a money payment, with the consent of the homage; which, in practice, meant, the previously arranged consent of two particular copyholders, summoned to a court at an inn, without public notice, and for that special purpose. [See also *Boulcott v. Winmill*, 2 Camp. 261.]

Since this Committee sat, several Acts of Parliament have been passed, for the disafforestation of particular Royal Forests, or parts of them; although the term "disafforestation" has been, in most cases, less appropriate than "enclosure" or "partition" would have been; for the cases have

usually been those in which the soil was vested in the Crown, subject only to the common rights of private persons ; instead of being vested in private persons, subject to the forestal rights of the Crown.

CHAPTER XIV.

PROPERTY IN WINDFALLS.

As between lessor and lessee, the right to windfalls of timber-trees which are decayed is in the lessee (4 Co. 63, b.). Even although the lease contain a reservation of all timber-trees, yet, if at the date of the lease, the tree was decayed, and incapable of being used as timber, it is not considered to be within the words of the reservation; and, therefore the lessee may claim it. See the before-mentioned case of *Channon v. Patch* (5 B. & C. 897). So, if the windfall be of trees which are not timber in their nature, it would seem that the lessee may claim them, if not prevented by exception, reservation, or otherwise; for since he might cut them down, he must be entitled to pick them up.

If timber-trees blown down be sound, they will belong to the lessor, as between him and the lessee; but whether the lessor's interest in them will be absolute, must depend upon his estate in the land. If he be tenant in fee, or in tail, in possession, and whether an infant or of full age, the property must vest in him absolutely. If he be tenant for life, without impeachment of waste, *Lewis Bowles's Case* 11 *2d* 19. shows that he may appropriate them to his own use. If he be tenant for life, impeachable of waste, it is clear that he is not absolutely entitled to them; and, until the time of the present Master of the Rolls, it seems to have been thought that he could not even claim a life-interest in their produce, but that the property in them belonged at once, in possession, to the first remainder-man entitled to a vested

estate of inheritance, subject, however, to a question which will be hereafter adverted to, whether, if one of the remainders be for life without impeachment of waste, the produce ought not to be invested and accumulated, and afterwards paid to him, if his life estate in the lands should come into possession.

In *Lushington v. Boldero*, 1851, Lord Romilly, M. R., says (15 Beav. p. 7): "Undoubtedly, the tenant for life does, in some cases, directly gain an advantage; but it is not by reason of his own act. Thus, where, by the act of God, a large quantity of timber is blown down by a storm, the produce is laid out in the purchase of stock, and the interest of the fund is paid to the successive tenants for life. So, upon the same principle, when timber is decaying, and it cannot benefit the reversioner to allow it to remain standing, the Court, having ascertained that it is for the benefit of all parties, orders the timber to be cut down, and the produce to be invested, and the interest of the fund to be paid to the tenants for life in succession."

The case then before his Lordship was not one of a windfall; and it is believed that there had not then been any instance in which windfall produce had, in fact, been treated as he suggested.

In the very recent case of *Bateman v. Hotchkin*, before the same Judge, in 1862 (31 Beav. 486), where timber had been blown down by a storm during a tenancy for life, impeachable of waste, his Lordship was disposed to give the tenant for life the interest of the fund produced by sale of the timber, and seems to have expressed a written opinion in Chambers to this effect: "In the case of timber blown down by a storm, there is no waste, because it is the act of God, but the produce of the sale belongs to the inheritance; that is, the money must be invested in Consols, and the interest paid to the tenant for life." Upon a subsequent argument in Court, his Lordship is reported to have laid down the rule

in rather different terms, viz., "The tenant for life is entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops. There must be an inquiry to ascertain what part of the fund is derived from timber or cuttings within that description."

In that particular case, the tenant for life, being impeachable of waste, could have been entitled to cut nothing, except what was not timber, or what (being timber) was applied in necessary repairs; unless it be considered (*supra* 59) as a decision that such a tenant for life may thin timber plantations.

*Re Hunter 1938
No. 2 19 and
if like for cutting*

Before this time, the only actually decided cases of windfalls seem to have been *Lewis Bowles's Case* (11 Co. 79), the *Welbeck Case* (*Duke of Newcastle v. Vane*, stated in 2 P. W. 240, and 3 P. W. 267), and *Ferrand v. Wilson* (4 Hare, 344). In the first of these, which was a windfall of a barn, but expressly held to be the same as a windfall of growing timber, the property was held to vest, at once, in the tenant for life for the time being, because she was without impeachment of waste. In the second case, it was given, at once, to the first remainderman of inheritance, notwithstanding there were several previous tenants for life. In the third case, it was, in like manner, decided to belong to the remainderman in tail, to the exclusion of the tenant for life, who was impeachable of waste. *Sec. 4. B. 44 Ed. iii p. 21 pl. 20 cited St. William (waste) (10)*

Re Vane waste 39 Sil. H. 400 76 and Re Pigott
In *Whitfield v. Bewick* (sometimes called *Bewit*), 2 P. W. 1914 121
240, Lord Macclesfield, in 1724, mentions the *Welbeck Case* thus: "It may be very necessary for the party who has the inheritance to bring his bill in this Court, because it may be impossible for him to discover the value of the timber; it being in the possession of, and cut down by, the tenant for life. This was the very case of the Duke of Newcastle against Mr. Vane, where, at Welbeck (the Duke's seat in Nottinghamshire), great quantities of timber were blown

down in a storm, and though there were several tenants for life, remainder to their first and every other son in tail, yet, these having no sons born, the timber was decreed to belong to the first remainderman in tail."

The same Welbeck windfall is mentioned, in pretty much the same terms, by Lord Talbot, in 1734, ten years afterwards, in *Bewick v. Whitfield* (3 P. W. 267), where he describes the estate on which the windfall happened as "the Cavendish estate;" so that from the description given by Lord Macclesfield and Lord Talbot, respectively, the accident must have occurred during the life of a Duke of Newcastle of the Cavendish family. The second and last of those Dukes died, without male issue, in the year 1691. He was the descendant of Sir Charles Cavendish of Welbeck Abbey. The case, therefore, would be to be found reported, if at all, sometime before the year 1691; but no statement of it more full than that thus given in Peere Williams has been discovered.

Lord Talbot, in *Bewick v. Whitfield*, treats it as being settled, that a windfall, or the produce of timber cut by wrong, would equally vest in the owner of the first estate of inheritance for the time being; but the case before him was not of either of those descriptions; for it was that of a joint bill by tenant for life in possession, and his infant son, the immediate remainderman in tail, applying to have timber cut under the direction of the Court.

If timber blown down is to be deemed part of the inheritance of the lands (which seems reasonable), the mode of applying its produce which Lord Romilly has thus pointed out, namely, by giving to the existing tenant for life, impeachable of waste, a life income in it, instead of at once handing over the capital to a remainderman, who may never live to come into possession, seems most consistent with principle.

o. This doctrine is of extreme antiquity. Thus at a time when many thought that "without impeachment of waste" evenely protected the tenant for life from profit use of the place waste, and treble damages (note 24, 25): it was said that tenant for life without impeachment could not recover damages for the value of the trees against a trespasser who had cut, because the property therein was in the reversioner, though he could recover damage for breaking the close: Statham, taking the modern view of "without impeachment of waste" dissenting from the 1st proposition & Roberts queries it Statham waste by Tilgh H. waste & citing 27 H vi not otherwise reported

CHAPTER XV.

PROPERTY IN TREES WRONGFULLY CUT.

1st. As to Legal waste.

2nd. As to Equitable waste.

1. As regards legal waste, it is to timber-trees only that our observations will apply; for they only are the subjects of legal waste, except in the cases of trees affording shelter, and of fruit-trees (2 Dick. 431), as to which it may be presumed that the rules of property in timber-trees wrongfully cut will apply.

The principle of the old authorities is, that the property in timber cut by wrong vests immediately in the owner of the first existing vested estate of inheritance.

Thus, in the much argued case of Udal v. Udal (Aleyn, 81), in M. T. 24 Car. I. 1648, in K. B., the defendant was tenant for life, with remainder to his sons in tail, and then to another for life, and his sons in tail, and then to the plaintiff in tail. The defendant cut timber, whilst the other tenant for life was living, but whilst neither the defendant nor he had any son born. The plaintiff brought trover, and recovered judgment; and the Court laid down three propositions:—1st, That if there be tenant for life, with remainder for life, with remainder over of the inheritance, and the first tenant for life cut down trees, he in the inheritance may seize them; although he could not have an action of waste, by reason of the existence of the intermediate remainder for life; 2nd, that the mesne remainders in contingency, although of an estate of inheritance, alter not the case; for

Udal v. Udal o. Udal
Roberts's note:

* If the case be carefully read it is the assent of the remaindermen of some inheritance
as the legal estate to laster upon trust to preserve and (as the collusion of tenant
for life and vested remainderman - that brings about the decision; either
alone would not have been enough.
see also *Staunfield v Habington* 10 Ves 279 *McClellan* 1877 W. 2. 198

an estate in contingency is no estate until the contingency happen; 3rd, that by the cutting down of the timber-trees, an absolute property was vested in the plaintiff, unless they had been cut down for reparations, and so employed in convenient time.

Whitfield v. Bewick (or *Bewit*), before Lord Macclesfield in 1724 (2 P. W. 240), is a distinct decision that timber wrongfully cut, as legal waste, by a tenant for life, belongs to the first existing owner of an estate of inheritance; notwithstanding that there may be intermediate contingent remainders in tail, duly protected by trustees to preserve, and also an intermediate vested remainder for life.

In *Garth v. Cotton*, so much discussed before Lord Hardwicke in 1750, and subsequently, and stated fully hereafter, (best reported in 1 Dick. 183), timber was cut by a tenant for life (impeachable, as it was held) in concurrence with the owner of the first vested estate of inheritance, but when there were contingent remainders in tail to the unborn sons of the tenant for life, protected by the usual limitation *to preserve &c.* Such a son was afterwards born; and, at his suit, it was held that the remainderman's collusion^x made him liable to refund his share of the produce. This was also a case of legal waste only.

In *Lee v. Alston*, before Lord Thurlow in 1779, 1783, and 1789 (1 Bro. C. C. 194, 3 Bro. C. C. 37, 1 Ves. Jr. 78), the defendant, Sir Rowland Alston, was tenant for life, with contingent remainders to his unborn issue, with remainder to the plaintiff, Mrs. Lee, in fee, or, as one report states it, in tail. He cut timber, applied part in repairs, and sold the rest, and kept the produce, alleging that he did so to repay enclosure expenses; but his right upon that allegation being negatived by the Court, the plaintiff's title to recover the produce by suit in Equity was held to be clear, unless it could be said that her remedy was only by action of trover, which Lord Thurlow held that it was not, and he made

a final decree in her favour. This was also a case of legal waste.

Whilst *Lee v. Alston* was in the Master's office, between the decree and the further directions, a case of *Williams v. Duke of Bolton* was decided by Lord Thurlow, in 1784. That was also a case of legal waste in timber, done by the duke. Its facts will be found in the reports of that cause, and of a supplemental cause of *Powlett v. Duchess of Bolton* (see notes to 3 P. W. 268 ; and 1 Cox, 72 ; 3 Ves. jun. 374). They were these: In 1765, the duke, under his brother's will, was tenant for life, impeachable of waste, with remainders to his sons in tail male, and then to Jane Mary Powlett Brown for life, and her sons in tail male; with reversion to the duke himself in fee; the contingent remainders being duly protected.^o When neither he nor the other tenant for life had any son, he cut timber. By a decree, in 1768, in *Williams v. Duke of Bolton*, the will was established, and an inquiry ordered as to the timber cut, and its application. In 1778, Jane M. P. Brown married Thomas Orde, and afterwards had a son, who lived only five days, and, afterwards, had another son, who continued to live. In 1783, the Master reported, that timber had been cut by the duke, and partly used in repairs, and that the other part was sold for 2943*l.* 0*s.* 10*d.*, which the duke applied to his own use. Thereupon, it was argued, before Lord Thurlow, that this sum belonged to the duke, as owner of the first-existing estate of inheritance at the time of the cutting, or else to the administrator of the deceased son of Mrs. Orde, or else to her second son. His Lordship rejected the claim of the duke, as being for his own wrong, and he decided also against the claim of Mrs. Orde's deceased son's estate, but it is not clear whether he thought that that deceased son was born before or after the cutting; for the former is stated (erroneously) in the earlier reports. He then also negatived the title of Mrs. Orde's present son, because he was liable to be defeated by the birth

o yes: limit
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himself,
See Bird v. Wolfe
1 Bick. 9 Eq. 304

of a son of the duke; and he finally directed that the produce of the sale, with interest from its receipt, should be brought into Court, with liberty to apply. Thus there arose a Court-fund of 6552*l.* 14*s.* 10*d.* consols.

In 1794, the duke died, without having had any son. The administrator of Mrs. Orde's deceased son renewed his claim, by a petition before Lord Rosslyn, who directed a bill to be filed. This led to the suit of *Powlett v. Duchess of Bolton*, by the deceased son's representative against the second son and the executrix of the duke. After argument for the plaintiff and for the second son, and upon the duke's representative not pressing her claim, Lord Rosslyn, in 1797, ordered the fund to be laid out in land, to be settled to the same uses as the estate. His reasons are thus given: "When this timber was cut, no doubt, at law, the duke would have taken, being the first owner of the inheritance; but the Court very properly held that he should not, by a fraud upon the settlement, which made him tenant for life, gain that advantage to himself in his reversion in fee. Considering it as a wrong upon the settlement, the consequence is, that part of the property, which, by the fraud, is taken from the settlement, ought to be restored to the settlement. The consequence is, that will carry it throughout, to all the uses. It is to be considered as realty. Mrs. Powlett [late Orde], therefore, will be entitled to an estate for life: the children to estates in tail male: and I cannot help the consequence of the reversion in fee going to the duke."

This principle of treating wrongful cuttings as part of the inheritance, and giving the income of them to all persons entitled to the lands in succession, except the author of the wrong, seems reasonable enough, and also to be justifiable enough, if it can be reconciled with the decisions in *Udal v. Udal*, *Whitfield v. Bewick*, and *Garth v. Cotton*; according to which it would seem that it ought to have vested absolutely

in the first tenant in tail, who came into existence after the cutting, without reference to the intermediate estate for life. Its vesting in the owner of the first estate of inheritance at the time of the wrong done, was necessarily prevented by that owner's being himself the wrong-doer. It seems also quite reasonable to charge him, as Lord Thurlow did, with interest upon his receipts, so long as they remained in his pocket.

It will be remembered that all these were cases of legal waste.

In the much-involved case of *Ferrand v. Wilson*, in 1845, before V.-C. Wigram (4 Hare, 344), the principal question was as to the validity of an unlimited power to trustees to cut timber; and the power was held to be void, as tending to a perpetuity; but questions were also raised as to the property in timber, cut by those trustees under their void power, and cut also by a tenant for life, impeachable of waste, and as to windfalls, during the time of that tenant for life; and the Vice-Chancellor treated it as clear that, in all those cases, the property was in the first existing tenant in tail in remainder; and although his Honour declined to make a decree in favour of that tenant in tail, on the ground that his remedy was at law, it seems, by the minutes of the decree, that such directions were, in a great measure, submitted to, by consent or arrangement; probably with a view to avoid further litigation.

It appears, by the judgment, that it was contended, by the tenant for life in possession, who was a party to the suit, that the produce of the timber improperly cut ought to be brought into settlement, as part of the inheritance, for the benefit of the successive owners; but that the only authorities cited in support of that argument were *Tooker v. Annesley* (5 Sim. 235), and *Waldo v. Waldo* (7 Sim. 261; [also 12 Sim. 107]); but certainly neither of those cases was applicable; and it was easy to say, with respect to them, that they applied to timber cut by the Court's order or sanction, as being de-

o There is a distrust in the case that timber might not vest in the first
life vested tenant in tail, if there was a prior contingent remainderman
in tail which might afterwards vest. This distrust contrary to principle
and authority is definitely and significantly overruled Re Cavendish
1877 W.L. 192

caying or injurious, whereas the case at present before the Court was one of mere legal waste. The argument would have had a better chance of success if it had been founded on the two cases of *Williams v. Duke of Bolton* (3 P. W. 268, n. ; 1 Cox, 72) ; and *Powlett v. Duchess of Bolton* (3 Ves. 374), which are not mentioned in the report of either argument or judgment in *Ferrand v. Wilson*.

In the very recent conjoined suits of *Bagot v. Bagot*, and *Legge v. Legge*, before the Master of the Rolls, 1863 (32 Beav. 509, and 33 L. J. Chanc. 116, and note there), the rights of a tenant for life impeachable of waste, and remaindermen for life and in tail, as to property in timber cut otherwise than for repairs, were much considered by the Court, and a compromise was recommended to avoid insisting on strict rights ; and although this advice was declined at first, it seems it was afterwards adopted, with the approbation of the Lord Chancellor, before whom the causes had been brought by appeal.

2. As to Property in Equitable Waste. *Rolt v. Somerville* (2 Eq. Ca. Ab. 759) is a note of a case before Lord Hardwicke, in Trin. Term, 1737, in which the plaintiff, Rolt, as tenant for life in possession without impeachment of waste, sought to make Lord Somerville answerable for the value of equitable waste in trees, which had been done by him as the second husband of Rolt's late mother, who had also been tenant for life without impeachment of waste. Lord Hardwicke allowed a demurrer to the bill, upon the ground that the injury complained of had been done to the inheritance ; by which it seems to have been meant that no one but the owner of an estate of inheritance in the lands had a right to claim an interest in the produce of the waste.

The *Marquis of Ormonde et Ux. v. Kynnersley* (5 Mad. 369, 2 Sim. & Stu. 15 ; 2 Bligh, N.S., 374 ; 7 Law Jour. Chy., O. S., 150, 8 *Ib.* 67 ; Reg. Lib. A. 1829, fol. 2190 ; 15 Beavan, 10, n.) was a case of a solemn decision of Lord

Lyndhurst, C., that a tenant for life has no right to sue for the value of equitable waste done by his predecessor; and, also, that although, as in that case, the owner of the inheritance may have conveyed the estate to the plaintiff before bill filed, and the conveyance is stated in the bill, that conveyance does not give a right to sue for the value of the waste, unless it was expressly made the subject of assignment;—the principle of law being, that the right to sue for the waste vests in the owner of the first estate of inheritance at the time of the waste being done, and does not afterwards pass from him by a conveyance of the land itself; and, also, that the right to the produce of equitable waste vests in the person in whom the right to legal waste would vest, if the tenant for life by whom the waste is done had been impeachable of waste. In that case, Lord Ormonde sued, at first, as the husband, and afterwards as the legatee, of Lady Ormonde, who was tenant for life in possession, for her separate use, with remainder to her issue in tail, of property, of which Mr. Clement Kynnersley, deceased, had been tenant for life in possession, without impeachment of waste, with remainder to his issue in tail; and who had done equitable waste to a large amount. At the time of the waste, neither Mr. Kynnersley nor Lady Ormonde had any issue, and the first existing estate of inheritance was the ultimate remainder in fee, which was vested in Lady Ormonde's father, Mr. Clarke, who afterwards, and before the suit, conveyed that remainder to Lord Ormonde in fee. It does not appear, from the reports, whether Lady Ormonde's estate for life was without impeachment of waste; but this would be unimportant as regards equitable waste. At first, a decree for an account of the waste was made, by Sir John Leach, against the executor of Mr. Kynnersley, the tenant for life. Of this hearing there is a short report in 5 Mad. 369, in 1820, upon the question whether the executors of a tenant for life are answerable for the equitable waste done by

him. An arbitration, to ascertain the amount, was afterwards agreed upon, and an award was published, and an order to enforce it was made in 1824 (2 Sim. & Stu. 15) ; but then it occurred to the defendant that the decree was wrong, upon the ground that the right to the waste had vested in Clarke, as the owner of the inheritance at the time it was done ; and, upon a rehearing, in 1825, Sir J. Leach reversed his former decree, and dismissed the bill (see 2 Bligh, N.S., 386). Upon an appeal, from this reversal, to the House of Lords, it was suggested that the appeal ought to have gone first to the Lord Chancellor ; and that it should then be considered whether the award was not a bar to the rehearing ; and, in 1828, the Lords sent the case to the Lord Chancellor, accordingly (see 2 Bligh, N.S., 392). The cause was, therefore, heard, on appeal, before Lord Lyndhurst, in 1829 and 1830 ; when the decree of dismissal was affirmed, on the ground that the right to the waste was in Clarke, and had not passed by his conveyance of the lands to Lord Ormonde, and that the award of the arbitrator was upon the *quantum* of damages only, and proceeded on the assumption that the first decree was valid and binding (see 7 L. J. Chy., O.S., 150, 8 *Ib.* 67).

It is remarkable that neither of these two cases of *Rolt v. Somerville*, and *Ormonde v. Kynnersley*, was cited in the arguments or decisions at the Rolls, of the late case of *Lushington v. Boldero*, in 1850, before Lord Langdale, and in 1851 before Lord Romilly (13 Beav. 418, 15 Beav. 1). To this circumstance Mr. Beavan has called attention, in a valuable note, in his 15th volume (pp. 9 and 10), where an outline of the two cases (Rolt's and Lord Ormonde's), and of the vicissitudes of the latter of them, is given. The case of *Lushington v. Boldero* itself, reported by Sir G. Cooper (p. 216), Maddock (vol. vi. p. 149), and Beavan (13 Beav. 418, 15 *id.* 1), much resembles *Ormonde v. Kynnersley*, in the difference of the aspects under which it was, at different times, presented to the Court. Its final result was a compromise,

after argument, upon appeal, before the Lords Justices ; but what were the principles of that compromise, we are not told. All we can collect, of those principles, is derived from the short reasons for postponement by Lord Langdale, and the careful judgment of Lord Romilly ; but the case might probably have been disposed of at once, by Lord Langdale, or else by Lord Romilly, if *Rolt v. Somerville* and *Ormonde v. Kynnersley* had been brought before either of them : for those cases seem to show that the property in equitable waste vests immediately, like legal waste, in the owner of the first existing estate of inheritance, and, therefore, that no claim to it or to its income can be set up, either by a tenant for life in remainder, or by any unborn issue, whose birth might defeat the existing first estate of inheritance.

The case of *Lushington v. Boldero*, as it ultimately presented itself, arose out of these circumstances :—

In the year 1785, John Boldero devised his manors of Aspeden and Berkesden in Herts, Aspeden Hall, with its park and lands, and also lands at Luffen Hall and Cromer in Norfolk, to trustees for 1000 years, upon trusts not stated, and probably immaterial at present, and then, subject to the term, to his son, Charles Boldero, for life, without impeachment of waste, with remainder to trustees during his life, with remainder to the first and other sons of Charles Boldero in tail male (with certain remainders to William Boldero and his issue, which failed of effect : see 13 Beav. 418, and 15 Beav. 1), with remainder to Henry Lushington, (his grandson, afterwards Sir Henry Lushington, Bart.) for his life, without impeachment of waste, with remainder to trustees during his life, with remainder to his first and other sons in tail male, with remainders over. The testator, by a codicil, directed the trustees of the term to let Aspeden Hall, and park, and the lands occupied with them by himself, for terms of twelve years at a time, whilst his son Charles should continue unmarried, determinable on his marriage or death,

at the best rent, without any power for the lessee to commit waste, and that the rents thus obtained should be laid out in land to the same uses.

At the testator's death, Charles Boldero was unmarried, and he continued so, up to and in the year 1812. In that year, he and his nephew, Henry Lushington, who had then become a baronet, were in partnership together in a house of business which became bankrupt; and the assignees of their joint estate, shortly afterwards, marked, for felling and sale, all the timber-trees in the park at Aspeden, and the lands occupied by the testator with it, treating such timber as part of the personal estate of Charles Boldero (see the Report in G. Coop. 216). Whether any lease of the park and lands had been granted by the trustees, does not appear; but, upon the timber being thus marked, Henry Lushington, junior, being the eldest son of Sir H. Lushington, and, as such, tenant in tail, filed his bill, in 1813, for an injunction against the intended cuttings; suggesting, also, that the codicil revoked the will, so far as it had made Charles Boldero's life estate unimpeachable for waste in the park and demesne lands. Sir Wm. Grant, M.R. (in 1815), decided that the codicil did not take away Charles Boldero's interest in the timber; and, thereupon, the assignees proceeded to cut it, without limit or exception, including timber (or trees) planted or left standing for ornament or shelter (see 6 Mad. 149), which was what Charles Boldero certainly could not have done; and when complained of, they justified themselves, by alleging, that the last-mentioned timber was either decayed, or else injurious to the growth of adjoining trees. The plaintiff, however, obtained an order of the Court, 5th August, 1815, directing an inquiry whether, in fact, the assignees had cut timber planted or left standing for ornament or shelter, and if so, whether it was decayed, or injured the growth of adjoining trees (see 6 Mad. 149). Upon this, a report seems to have been made, finding that timber planted or left standing for ornament or shelter had been

cut; but that parts of it were decayed, or injured the growth of adjoining trees. Upon exceptions to this report being brought before Sir John Leach, V.C., in 1819 (6 Mad. 149), he declined to consider that decay was a justification for cutting, or that injury to other trees was a justification, unless the injured trees were themselves important for ornament or shelter; and, therefore, he made another reference, in these terms, viz., to inquire whether any and which of the timber and other trees, so cut and sold, injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter intended by the deviser, that the removal of the timber and other trees so cut and sold was essential to such purposes of ornament or shelter (Reg. Lib. B. 1818, 765-7, Seton, tit. Injunctions).

As regards the decayed trees, Sir John Leach's view was that of *Bewick v. Whitfield* (3 P. W. 268), although that case does not seem to have been cited.

The result of these inquiries was, that the assignees paid into Court, for the produce of ornamental timber and the interest upon it, a sum of 6379*l.* 4*s.*, which was accumulated, so as to make, in the year 1850, a sum of 26,000*l.* At that time, Charles Boldero and Sir H. Lushington were both living, but the former was ninety-five years old, and without issue; and the plaintiff applied, by petition, to Lord Langdale, (see 13 Beav. 418) for a transfer of the fund to himself, as first tenant in tail, upon the presumption (now a moral certainty) that Charles Boldero would have no issue. It did not appear that the plaintiff's entail had been barred; and probably it could not have been barred without the assignees' concurrence, which was not likely to have been given. The only respondents to the application were the assignees; but they do not seem to have been heard; for Lord Langdale said that "the point could not be decided in the absence of any of the parties interested; and as it could not be said that

the issue of Charles Boldero, if there should be any, had no possible interest in the fund, the case, during the life of Charles Boldero, was not ripe for decision."

In the following year (1851), Charles Boldero died, without issue; and then the plaintiff's former application was brought before Lord Romilly, M. R. (see 15 Beav. 1); and it was granted, after a strenuous argument of the assignees, who insisted that they were entitled to the income which had accrued during the time of the late tenant for life, or, at the least, to the income of the accumulated fund, which should now accrue, during the life of the new tenant for life, Sir Henry Lushington, in respect of whose estate they could not be said to have been wrongdoers, because the cuttings had been made in respect of the life estate of C. Boldero only, and when Sir H. Lushington's survivorship was uncertain. His Lordship decided against the assignees, upon both points, and refused to allow them to take advantage of their own wrong, by reason of the accidental survivorship of the second tenant for life, and, indeed, refused to distinguish their character as assignees of one life interest from their character of assignees of the other life interest; but, on the contrary, likened their case to that of collusion between two tenants for life.

Looking at this case in the light of Lord Romilly's judgment, it may reasonably be asked, Whether there really were any valid objections to the tenant for life's receiving the capital of the fund, at any time after he came of age? First, It is clear that the assignees of the first life estate could take no interest in the waste; for they were the wrongdoers who committed it. Secondly, The assignees of both the first and the second life estate were the same persons, and continued to be so, or at least to represent the same creditors, down to the end of the second life estate; and independently of Lord Romilly's very forcible reasons, why the owners of the one life estate should not be distinguished from the owners of

the other, the cases of *Rolt v. Somerville* and *Ormonde v. Kynnersley* seem to show that no tenant for life in remainder, however innocent, takes any interest in equitable waste committed by a tenant for life in possession. Thirdly, Ought the possibility of issue of Charles Boldero to have been a difficulty? If the waste had been legal, the cases of *Udal v. Udal*, *Whitfield v. Bewick*, and *Lee v. Alston*, show that it ought not; and although, in *Williams v. Duke of Bolton*, a fund of legal waste was laid out in land, notwithstanding that, at the time of the investment, there was in existence a tenant in tail, whose estate might be defeated by after-born issue, it is to be remembered that he was not in existence when the waste was done, and that the owner of the first estate of inheritance at that time was the wrongdoer himself; and there may well have been an equity to make him refund, for the purposes of settlement, the property cast upon him by the rule of the common law. Fourthly, Can the circumstance of the waste being equitable, make it liable to be settled, instead of vesting, as at law? *Rolt v. Somerville* and *Ormonde v. Kynnersley* contradict this, however reasonable in itself. Fifthly, Is it a valid objection that the tenant in tail had not acquired the fee, for want of the assignees' concurrence under the 29th section of the Fines and Recoveries Act? for this defect must be assumed, although not expressly mentioned. It may be answered, that so long as the Court allows an infant tenant in tail to take an absolute interest in legal waste done by himself, it cannot make the present incapacity to bar the entail an objection to the absolute nature of the tenant in tail's interest in property of this description. Whether an infant tenant in tail ought to be regarded so favourably, is a fair subject of discussion; as we have already attempted to show.

The true principle, applicable to all waste, either legal or equitable, seems to be, to treat it as part of the inheritance, and to make it devolve as such; but this can only be done

by the Court of Chancery; and that Court has not hitherto considered itself entitled to interfere with the legal right to legal waste, which the law casts upon the owner of the first estate of inheritance, unless he be himself the author of the wrong: and it has hitherto thought itself bound to follow the law, in declaring the devolution of title to equitable waste.

CHAPTER XVI.

PROPERTY IN TREES CUT BY ORDER OF THE COURT OF CHANCERY, OR WITH ITS SUBSEQUENT SANCTION.

Bewick v. Whitfield (3 P. W. 267), before Lord Talbot, 1734, is usually cited as an authority for the principle, that if timber is cut by the direction of the Court, its produce shall vest, at once, in the owner of the first existing estate of inheritance; and that the tenant for life shall take no interest in it; and that the only regard paid to his rights will be to leave enough to provide "botes" for him, and to take care that the cutting does as little damage as may be. Mr. Cox, however, has shown, in his note to the report (referring to Reg. Lib. A. 1733, fol. 512), that no question could have been argued in that case between the tenant for life and the remainderman, because they were co-plaintiffs, being a father and his infant son of three years old, who prayed that decaying timber might be cut for the benefit of the infant. The defendants, entitled in remainder after the infant's estate tail, asked, by their answers, that the money produced by the timber should be secured for the benefit of the persons who should be entitled to the inheritance of the lands. The decree ordered the cutting, and the investment of the produce, for the benefit of the infant when of age; which may, perhaps, be deemed to mean, that he would be entitled to it as his own, even if he should not live to cut off the entail.

The limitations, in this case, seem to have been legal only, and the father appears to have been impeachable of waste.

In *Mildmay v. Mildmay* (4 Bro. C. C. 76), which was successively before Lord Thurlow, the Lords Commissioners Eyre and Bathurst, and Lord Rosslyn, C., the wife of Sir Henry Paulet St. John Mildmay was tenant for life, under a will, with express proviso against waste, with remainder to trustees to preserve, with remainder to her first and other sons in tail male, with remainders over. The plaintiff was her infant son, tenant in tail, about three years old. The defendants were his father and mother. The bill prayed that timber fit to be cut, and in danger of decay, might be cut, and the produce invested for the plaintiff, "or such persons as should become entitled to an estate of inheritance in possession under the will." The defendants, admitting the facts alleged, insisted that Lady Mildmay should have the income for her life, and suggested (before Lord Thurlow) that the plaintiff might not live to come into possession, and in that event, another remainderman might treat the cutting as waste, which the trustees to preserve ought to have prevented. On the other side, it was said, that a direction to lay out the money for such person as should become entitled in possession would be a sufficient security for the rights of all parties: and *Tullit v. Tullit* (Amb. 370); *Marsh v. Lisle*, before Lord Bathurst in 1778; and *Williams v. Duke of Bolton* (Cox's notes, 3 P. W. 267) were cited. Lord Thurlow's decree directed enquiries, whether it would be beneficial to the plaintiff, and the persons interested in contingency, to have the timber cut, and upon what terms. The report found in the affirmative, as to the benefit, and advised that the money should be paid into Court for the parties interested. The cutting took place on these terms; and then the cause came on before the Lords Commissioners, in 1792, when the plaintiff asked that the money should accumulate until he should be of age, with liberty, if he should die (probably under age), for any person entitled to apply. The defendants insisted that although they could

not themselves cut timber, nobody could cut it without their consent ; and that if the tenant in tail was of age, he could not cut it but upon terms with them, and that they would not consent, [have consented] unless upon having a life estate in the money. Lord Commissioner Eyre said, the claims of the tenants for life would be open to them when the tenant in tail should come of age ; that he thought the Court had done wrong in doing for the tenant in tail what he could not have done for himself ; and that, in the mean time, the money should be invested in the funds. Lord Commissioner Ashurst concurred. We are told, in a note to the 3rd edit. of Brown, that Lord Rosslyn afterwards ordered the fund to be laid out in lands, to be settled to the same uses as the estate.

This would be in accordance with what he did in *Powlett v. Duchess of Bolton* 3 Vesey, 374), 1797, and, perhaps, was after his decision of that case ; but there the timber had been cut by the wrong of a previous tenant for life. Does this make a difference ?

The right of a tenant for life, impeachable of waste, to receive the income of a fund arising from timber cut by the Court, or with its subsequent sanction, was very much discussed, in 1832, before Sir L. Shadwell, as after mentioned ; but the question seems to have been really decided, in the affirmative, many years before.

In 19 Vesey (p. 423), Sir Wm. Grant mentions a case of *Lewis v. Cray*, in 1798, before Lord Rosslyn, where the interest of the money was given to the tenant for life ; and the context shows that Sir Wm. Grant considered "the money" to have arisen from the Court's own cuttings.

In *Osborne v. Osborne*, in 1815 (stated in 19 Ves. 423, and in 5 Sim. 239, from Reg. Lib. 1814, B. 1149), Lord Eldon, overcoming some hesitation which Sir Wm. Grant had felt in the same case, not only gave the income to the tenant for life, but applied part of the capital in dis-

charging an incumbrance, of which the tenant for life must have kept down the interest.

In *Wickham v. Wickham*, 1815 (G. Coop. 288, and 19 Ves, 419), Sir W. Grant, holding himself bound by *Osborne v. Osborne*, declared that the tenant for life would be entitled to the income of the fund produced by the Court's cuttings by consent of the parties ; and he directed that the fund itself should be laid out in land, to be settled to the uses of the will devising the estate. There was also a question of construction, whether the tenant for life was herself entitled to cut timber, and, therefore, to claim the corpus of the fund ; but this question Sir W. Grant refused to decide, saying, that if anything more than the income was claimed, the question was legal ; and it seems to have been abandoned.

In *Tooker v. Annesley*, in 1832 (5 Sim. 235), the question was really that which had been decided in *Osborne v. Osborne*, and afterwards in *Wickham v. Wickham* ; and although very strenuously argued against the claim of the tenant for life (impeachable of waste), the only foundation for the argument was the fact, that the cutting, by the Court, had been done at his instance, and that the tenant in tail, who was an infant, was incapable of consenting to it, and that there was some ground for supposing that the orders in *Osborne v. Osborne* had been made by arrangement, and that *Wickham v. Wickham* depended upon them. The Vice-Chancellor decided in favour of the tenant for life, and concluded a very elaborate judgment, in these words : " I think, therefore, that there is not only sufficient principle, but that I am actually bound, by the authorities, to say, that in this case, the course that has hitherto been adopted ought to be persevered in, and that the costs of all parties ought to be paid out of the fund which has arisen from the sale of the timber, and that the tenant for life is entitled to the interest of the fund remaining after the payment of the costs."

In *Waldo v. Waldo*, in 1835 and 1841 (7 Sim. 261 and 12

Sim. 107), timber had been cut by a trustee of the legal inheritance, without special authority from his instrument of trust, or from the Court of Chancery, but with the consent of the first and second tenants for life, the first of whom was, and the second of whom was not, impeachable of waste, upon the opinion of a surveyor, who marked the trees, as being at maturity and in an incipient state of decay. It was held, first, that the cutting might be treated as being as proper as if done by the Court; and 2ndly, that the first tenant for life, although impeachable of waste, was entitled to the income for her life; and 3rdly, that upon her being succeeded by another tenant for life, who was exempted from impeachment of waste, the corpus of the fund belonged to him, and not to the remainderman of the inheritance. The same Vice-Chancellor followed this decision, in a subsequent case of *Phillips v. Barlow*, in 1844 (14 Sim. 262), in which he gave to the tenant for life, without impeachment of waste, the capital of a timber fund arising from cuttings by the Court's order. These cases were the foundation of the Vice-Chancellor Wood's decree in favour of the plaintiff, in *Gent v. Harrison*, stated presently, in which he seems to have assumed the law to have been settled by them.

The only reason given, by Sir L. Shadwell, for his decisions in favour of the tenant for life, without impeachment of waste, in *Waldo v. Waldo*, and *Phillips v. Barlow*, was that expressed in the former of these two cases, in the following terms; viz., "That he asked only for that which he would have been entitled to, if he had exercised that power, which the law gives him a right to exercise when he comes into possession." (See 12 Sim. 113.)

A more satisfactory reason, it is submitted, with great respect, would have been, that, inasmuch as the timber, in the cases in question, had been cut, either by the Court itself, or by the trustee with the Court's subsequent approbation, and because it was decaying, it might be assumed that the

tenant for life, without impeachment of waste, would have cut it himself, as part of good management, if it had stood until his time. It would be fraught with consequences inconsistent with policy, if it were assumed that the tenant for life would have done whatever he could have done without impeachment; in other words, that he would have done waste, if it had been in his power. The words, "without impeachment of waste," are added, to the limitation of his estate, for the purpose of exempting him from vexatious legal consequences; and not in the belief that he will actually do anything more, in the exercise of his powers, than is consistent with husband-like management. If these words are not inserted in his favour, no single timber-tree could be cut by him, except for the purpose of being specifically employed in repairs: he could not even sell unseasoned timber, to buy that which was seasoned and fit for use; he could pick up no timber-tree blown down by the wind, without making himself liable to an action of trover by the owner of the first estate of inheritance.

This brings us to the very remarkable case of *Gent v. Harrison*, before V.-C. Wood, in 1859 (Johnson, 517), which was treated as if it had related to a cutting of timber with the approbation of the Court, but which cannot but raise some serious doubts in the mind of an attentive reader of the report. The plaintiff was tenant for life in possession, under a will, without impeachment of waste, with remainder to trustees to preserve, and then to his first and other sons in tail male (of whom he had none), with reversion to the right heirs of the testator; and the bill alleged that the heir could not be discovered by the plaintiff; but of this allegation no proof whatever appears to have been given. The defendants were the trustees to preserve, and the executors of two preceding tenants for life, each of whom had been subject to impeachment of waste, and each of whom had cut timber in considerable quantities; one of whom had paid part of the

produce to the trustees to preserve ; and the executors of both of whom had paid other sums, arising from their respective testators' cuttings, to the same trustees ; but leaving, as to one of them, a large balance still unpaid ; and each of them had been allowed to receive, successively, during life, the income of the fund in the trustees' hands. The plaintiff's case was, that the cuttings had been wrongful ; and, therefore, that the income received by the deceased tenants for life must be refunded to him, out of their assets ; and that he was entitled to receive the capital of the funds, from the trustees, on the authority of the decisions of Sir L. Shadwell in *Waldo v. Waldo* and *Phillips v. Barlow*.

Upon the case being opened, the Vice-Chancellor told the plaintiff's counsel, that he could not give him the capital, if he insisted upon treating the cuttings as wrongful—at least, not without hearing the heir-at-law—but that he would give it to him, if he elected to treat the cuttings as rightful ; upon the authority of the two cases just mentioned ; and, in that case, it would follow, from the other decisions of Sir L. Shadwell above stated, that the deceased tenants for life had been entitled to the income during their lives. The plaintiff's counsel, thereupon, elected to treat the cuttings as rightful, and obtained a decree for payment of the corpus of the funds ; and the consequence of this election, necessarily, was, that the bill was dismissed, with costs, as against the estates of the two late tenants for life.

Whether the cuttings were, in fact, right or not,—that is, whether they were such as the Court of Chancery would itself have made, and which, by indulgence, it would, therefore, retrospectively sanction, in a tenant for life impeachable of waste,—was a question of fact, upon which we are told that the evidence was conflicting, and as to which there was some probability of the negative, arising from the retention, by one of the tenants for life, of part of the corpus, which it did not appear that he had applied for the benefit of the estate ; but

o Continuity not *Coke 536 Co. Litt 556* if A & B tenants in tail
in remainder to them and the heirs of their two bodies, begin the
action of waste, against A tenant for life for cutting, and B dies
pendent the action, C now becomes tenant in tail after possibility,
a new life estate. *148* *Not impeachable for waste because of the*
TREES AND WOODS.

inheritance that was once in him; but the action at once fails.
Prohe Ab: Waste it does not seem to have occurred to the Court, or to the
50 counsel for the trustees, that this question ought to be deter-
mined in the presence of the heir, as to whose absence there
was nothing but the allegation of the plaintiff, that he could
not discover him; and, at the very least, the Court might
reasonably have made its own inquiries on this subject, before
it decided without him.

Upon the question, which the Vice-Chancellor raised, and
declined to decide in the heir's absence, namely, whether the
tenant for life, without impeachment of waste, could be en-
titled to the produce of timber wrongfully cut by a preceding
tenant for life, who *was* impeachable, it is believed that
there is no direct decision. *See top.*

The general principle of law gives the produce of unlawful
cuttings, immediately, to the person who, at the time of the
cutting, is the owner of the first vested estate of inherit-
ance in remainder;—that is, it vests the property in the
timber itself in him; see *Lewis Bowles's Case* (11 Co. 79),
Udal v. Udal (Aleyn, 81), *Whitfield v. Bewick* (2 P. W.
240), and *Lee v. Alston* (3 B. C. C. 37). Can it be said, that
the claim of the owner of the first estate of inheritance is to
be defeated, by his being told that there is, in the series of
limitations, a tenant for life in remainder, without impeach-
ment of waste, who may, possibly, if he lives so long, come
into possession, perhaps thirty or forty years afterwards; an
interval which, in fact, existed, in *Gent v. Harrison*? And if
such a tenant for life is to defeat the claim, must his estate
necessarily be precedent to that of the owner of the existing
first estate of inheritance? May it not as well be an estate
subsequent; since the estate of inheritance itself may cease,
as by the death of a tenant in tail, during the continuance of
the previous estates for life? And if the tenant for life in
remainder, who is unimpeachable of waste, can thus, for the
time, defeat the claim of the owner of the inheritance, is the
fund, which is a legal, and not an equitable debt, to be in-

vested and accumulated, to abide the event? For, of course, the tenant for life can be entitled to nothing, until he shall come into possession, which he never may.

The answer to these questions seems to be, in substance, found, in the observation of Lord Hardwicke, in *Garth v. Cotton* (see 1 Dick. 204), that the legal property in the waste must vest in somebody, and cannot be in suspense; and as it is part of the inheritance, the then owner for the time being of the first estate of inheritance (even if defeasible) must be the person to bring an action of trover for its conversion. To the same effect is the Vice-Chancellor Wood's expression: "There must be the property in somebody, when the wrongful act is done" (Johnson, 525). *Re Barrington* 33 Ch D 527

In the year 1792, in the case of *Pigot v. Bullock* (1 Ves. Jr. 479), Buller J., sitting for Lord Thurlow, mentioned a case, not reported, which had come before the Court of King's Bench from the Assizes, in which it was held, that a tenant for life in remainder, without impeachment of waste, could not bring an action of trover for timber wrongfully cut before his possession; for that it vested immediately in the owner of the inheritance. Upon the same principle, he decided, in *Pigot v. Bullock* itself, that if a tenant for life be validly restrained, by will or settlement, from cutting underwood, which seems of doubtful possibility, a succeeding tenant for life, although he might himself cut it, whether impeachable of waste or not, can bring no bill for the underwood cut before his possession. *Re Williams* 1922 2 Ch 1756

It will be expected that the anomalous case of *Davies v. Wescomb*, in 1828 (2 Sim. 425, Reg. Lib. A. 1827, fol. 2648), before Sir L. Shadwell, should be mentioned, because it is found cited in many reports. Lands were devised to trustees to sell and pay debts, and, subject to that trust, to the testator's sister for life, without impeachment of waste, with remainder to her first and other sons in tail. The trustees sold some land, with the timber upon it, and also cut and

sold the timber upon other lands ; and, with the produce of both sales, they paid the debts. The sister died, leaving an infant son, tenant in tail, and a husband, who took out administration to her, and then insisted that the trustees ought not to have cut any timber upon the unsold lands, but ought to have sold more land with the timber upon it ; and he claimed, in right of his late wife, and against his infant son, a charge upon the unsold lands for the value of the timber cut upon them. The Vice-Chancellor allowed the claim, and, apparently, on the principle, that the timber upon the estate was to be treated as the absolute property of the tenant for life, without impeachment of waste, whether cut by her or not. The case of *Cholmeley v. Paxton*, as reported in 3 Bingham, is said to have been referred to, as showing that the lands could not have been sold without the timber upon them ; but that case, so far from showing that the tenant for life, without impeachment of waste, is to be considered owner of the timber, is an authority for the contrary opinion ; and it is not to be necessarily assumed, that, because a tenant for life is indemnified from the penalties of waste, if done, and entitled to convert its produce to his own use, he will, therefore, be certain to do it. It is assuming that he will not manage the property in a husband-like manner, because the management of it is trusted to his honour and discretion. It will be observed, too, in the particular case, that the value of the whole timber sold was given to the representative of the tenant for life, whereas, upon his own contention, the proper course would have been, to sell part of the unsold land with the timber upon it, which view is supported by *Cholmeley v. Paxton* ; and, if so, the value of the timber upon that part, which would thus have been sold, should not have been given, by the Court, (as it was) to the estate of the tenant for life.

CHAPTER XVII.

REMEDIES AT LAW AND IN EQUITY.

THE old books speak of prohibitions against waste, and of actions for waste, in a manner which makes it difficult to say whether the same things, or different things, are meant. Lord Coke seems to treat prohibition as a remedy at Common Law, antecedent to any Statute of Waste, and to think that it might still be used in its original character, notwithstanding that Parliament had expressly abolished, in 1285, the prohibitory character of the writ which was then issued (see 2 Inst. 299 and 389, and 1 Bos. & Pull. 105). At this day, an inquiry on such a subject would be of little value. The only thing useful seems to be, such an attempt at definition as will make the old language intelligible. It may be said, with more certainty, that, before 1285, the writ of waste was prohibitory, as well as remedial; but that an enactment of that year made it remedial only. We learn that, at Common Law, (before any statute) a writ of waste (probably for damages or for restraint) issued against guardians in chivalry (not in socage), and tenants in dower, and, perhaps, tenants by the curtesy; but not against tenants for life or for years (see 2 Inst. 299; F. N. B. 55; 11 Co. 81, 2; and notes in 2 Swanst. 145, *et seq.*). Then, the Great Charter, c. 4 (1225), made guardians of the King's wards-in-chief by knight service, forfeit their wardships for waste; and afterwards, by the Statute of Marlebridge in 1267 (52 Hen. III. c. 23; see also 2 Inst. 145), this enactment was made, "*Firmarii, tempore firmarum suarum, vastum vel exilium non faciant,*

de boscis, domibus, vel hominibus, nec de aliquibus ad tementa quæ habent ad firmam spectantibus, nisi specialem inde habuerint concessionem, sive convencionis mentionem, adeo quod hoc facere possint. Et si fecerint, et super hoc convincantur, dampna plene refundant, et graviter per misericordiam puniantur."

Upon this statute, Lord Coke, quoting Bracton, says, that it gave a prohibition against a tenant for life or for years (11 Co. 81, b. 82). This, however, has been much doubted: but by the Statute of Gloucester, in 1278, 6 Ed. I. c. 5, the remedy of a writ of waste was expressly given against tenants in dower, by the curtesy, for life, or for years, with forfeiture of the place wasted, and treble damages; and as to guardians in chivalry, the Great Charter was re-enacted and extended. The terms of the Statute of Gloucester are these: "It is provided also, that a man, from henceforth, shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste shall leese [lose] the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the Great Charter. And where it is contained in the Great Charter that he which did waste during the custody shall leese the wardship, it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship" [See also 2 Inst. 299-307].

Then the same statute also provides (c. 13) that "after such time as a plea shall be moved, in the City of London, by writ, the tenant shall have no power to make any waste or estrepement of the land in demand (hanging the plea), and if he do, the mayor and bailiffs shall cause it to be kept at the suit of the demandant; and the same ordinance and

statute shall be observed in other cities, boroughs, and everywhere throughout the realm " (see also 2 Inst. 327).

The Statute of Westminster the 2nd, in 1285 (13 Edw. I. c. 14), recites, that for waste done in the inheritance by guardians, tenants in dower, by the curtesy, or otherwise, for life or years, a writ of prohibition of waste had been used to be granted; by which writs many were deceived, thinking that such as had done the waste should not need to answer, but only for waste done after the prohibition to them directed; and it then ordains that, of all manner of waste, done to the damage of any person, there shall, from henceforth, be no writ of prohibition awarded, but a writ of summons; so that he, of whom complaint is, shall answer for waste done at any time: and if he come not after the summons, he shall be attached, and after the attachment, he shall be distrained; and if he come not after the distress, the sheriff shall be commanded that, in proper person, he shall take with him twelve, &c., and shall go to the place wasted, and shall inquire of the waste done, and shall return an inquest; and after the inquest returned, they shall pass unto judgment, like as is contained in the Statute of Gloucester (see also 2 Inst. 389).

The writ of waste, from henceforth, assumed the form of a summons, to show cause wherefore the tenant had committed waste on the lands, houses, woods, &c., demised to him (F. N. B. 55).

It may be seen in Fitzherbert (F. N. B. 60, 61), that the writ of estrepement given by the Statute of Gloucester, to prevent the stripping of lands pending an action to recover them, was an extension only of the Common Law writ of estrepement, incident to every real action; that is, to every action in which the land itself could be recovered, but which writ could only be obtained after judgment; whereas, now, the plaintiff might "purchase" his original writ in the action, and his writ of estrepement, at the same time. To the same effect is Lord

Coke ; except that he says, that a Common Law writ of estrepement might have been issued at any time after verdict [2 Inst. 328].

The Statute of Gloucester, by making the writ of waste the means of recovering the place wasted, as well as damages, gave it the character of a real, as well as a personal, action—sometimes called a mixed action. As a real action, the writ of estrepement would be incident to it; but by the Statute of 1833 (3 & 4 Will IV. c. 27), all real and mixed actions were abolished; and it is presumed that estreplements perished with them; and c. 13 of the Statute of Gloucester was repealed, as useless, in 1863.

The writ of waste, which thus fell, had long ceased to be in common use. An action on the case, in the nature of an action of waste, had been found more easy and effectual. The writ of waste lay only for the owner of an estate of inheritance, in immediate reversion; and although the place wasted could be recovered by it, the proceedings were so cumbrous and technical, that they often failed; and when they succeeded, they usually applied only to the particular spot where the waste was done. In leases for years or for lives, at a rent, a covenant not to do waste, with a power of re-entry if it was done, had been found the practical means of recovering the whole property demised, instead of a small spot only. The action on the case could be brought by tenant for life, or even for years, and whether in immediate reversion or not. A writ of waste did not give the plaintiff his costs, except in cases of very small value under the statute 8 & 9 Will. III. c. 11: but he got them in an action on the case.

See, for all such distinctions, 2 Wms. Saund. 252, *et. seq.* in the notes to *Greene v. Cole*, and the authorities there referred to.

Since the writ of waste was abolished, it may well have been doubted, whether the action on the case could be brought; both because it would be in the nature of another

action which could not itself be sustained, and also because, as regards tenants for life, their liability for waste depended upon their having been made subject to a writ of waste itself by the Statute of Gloucester, unless it can be said that they answer the description of those "firmarii," who are forbidden, by the Statute of Marlebridge, to do waste, in the time of their farms, upon any of those things which they have to farm; which, probably, must be confined to lessees at a rent. It would seem, however, that the Common Law Procedure Act of 1852, by providing that no precise form of action shall be necessary in a writ of summons, has removed this technical difficulty, and that, in all cases except that of tenant for life under a will or a settlement, it would be held that as, either by the Common Law, or by the Statute of Marlebridge, waste is unlawful, an action on the case by the party grieved would be maintainable. An injunction in Chancery, if applied for in time, would probably be awarded in all cases, including that of tenant for life by will or settlement; upon the principle that, if property is duly destined to be enjoyed in succession, it is the Court's duty to preserve it from devolving on the successor in an impaired state.

Cutting down another man's trees is a "tort," or wrong,^x for which, in former times, his executor was not answerable in an action at law, unless it was framed as for value had and received, and not for the wrong itself; upon the principle stated thus, by Lord Mansfield, in *Hambly v. Trott* (Cowp. 372), "Where, besides the crime, property is acquired,^o which ^o *Int 168, 169.* benefits the testator, there, an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees; but, for the benefit arising to his testator for the value of the sale of the trees, he shall."^o

In cases of legal waste, the remedy for wrongful conversion of timber, by an action for the value of it, continues as before;

o It is essential to prove that the trespasser has increased his estate, not merely diminished the trespasser's estate, and the same principle applies even as to the Crown, when no action *Philips v. Hayfray* 24 Ch D 439
Geith v. Pease 1914 2 Ch 108 the rule applies to action.

of the Crown A.G. v. Sheringham Saville 40 K.L. 90.
But a contractual liability may in certain cases be imposed
for the mere damage done e.g. the cutting of a branch may
impose such quasi contractual liability
Blackmore v. Whyte 1899 12 B. 304 Battyman v. Walford 36 Ch. D. 569

or an injunction may impose such quasi liability as a person
injuring the estate Andrews v. W. 52 L.J. 61

subject to the provisions of the modern Common Law Procedure Acts, which have rendered it unnecessary to state the form of action in the writ of summons; but, of course, those actions are available, as to timber, only where the right of absolute property in the timber cut is vested in the plaintiff. The action of damages for a trespass may also be brought, in cases in which wrong, in respect of trees, has been done upon land in the actual possession of the plaintiff, or upon trees reserved to him out of a grant of the possession of the land to another. *Supra*, p. 18.

The Common Law Procedure Act of 1854 has also given a remedy by injunction at law, which, perhaps, may be made practically available, in some cases of breach of contract or other injury with respect to trees.

By that Act (17 & 18 Vict. c. 125), ss. 79 to 82, it is provided, that in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought, an action, he may, in like case and manner as thereinbefore provided with respect to Mandamus, claim a writ of injunction, against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress; and the writ of summons in such action shall be in the same form as the writ of summons in any personal action; but that, on every such writ and copy thereof, there shall be endorsed a notice, that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction; and the proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a Mandamus under the provisions thereinbefore contained: and, in such action, judgment may be given, that the writ of injunction do or do

not issue, as justice may require ; and in case of disobedience, such writ of injunction may be enforced by attachment by the Court, or, when such Court shall not be sitting, by a Judge : and it shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply, *ex parte*, to the Court or a Judge, for a writ of injunction, to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right ; and such writ may be granted or denied by the Court or Judge, upon such terms, as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just : and in case of disobedience, such writ may be enforced by attachment, by the Court, or, when such Court shall not be sitting, by a Judge : Provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court, on application made thereto, by any party dissatisfied with such order.

The provisions as to *Mandamus* previously contained in the Act, and referred to by the sections just quoted, authorised the plaintiff, in any action in the Superior Courts, except *replevin* and *ejectment*, to claim, together with any other demand which might be enforced in the action, or separately, a writ of *Mandamus*, commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested (s. 68).

It is hardly probable that, in cases of wrongful cutting of trees, much resort will be had to the remedy by injunction at law. It will seldom be issued as an interlocutory proceeding, which would constitute its chief value ; and the difficulty of bringing on a motion to dissolve it when granted, which, it seems, could only be done when the full Court is sitting in

banc, would make it hazardous to issue it at all, except as part of a final determination of the cause.

It seems to have been early held, that the writ of waste was available only by a tenant in fee-simple or in fee-tail (F. N. B. 60), and only by such a tenant in immediate remainder or reversion; so that an interposed estate for life prevented the issuing of the writ (see Co. Lit. 53, 54; 2 Wms. Saunders, and many other authorities; contrary, in this respect, to F. N. B. 58). To remedy this inconvenience, Courts of Equity seem to have been in the habit, from a very early period, of issuing a writ of injunction, to stay waste, at the suit of the remainderman or reversioner in fee or in tail, whenever a life estate was interposed between the estate of the person in possession and the remainder or reversion in fee or in tail. In a case in Moore's Reports, in the time of Queen Elizabeth (p. 554), Lord Keeper Egerton (afterwards Lord Ellesmere) said, he had seen a precedent, of such an injunction, as old as the time of Richd. II. *Roswell's Case*, 16 James I., stated in 1 Roll. Abr. 377, seems to this effect; but it is possible that, in that case, the remainderman for life was held entitled to the injunction. At all events, Lord Hardwicke, in 1744, granted an injunction at the suit of a tenant for life in remainder. It was in *Perrot v. Perrot* (3 Atk. 94). The case was one of merely legal limitations, viz., to the defendant for life, with remainder to his first and other sons in tail, with remainder to the plaintiff for life, with remainder to his first and other sons in tail, with reversion to the defendant in fee. There were trustees to preserve contingent remainders; but whether the defendant had, at present, any son, is not stated. Both tenants for life appear to have been impeachable of waste; and, upon the defendant beginning to cut timber, the plaintiff brought his bill for an injunction. It was insisted, for the defendant, that the timber had come to its full growth, and would decay if not cut, and also that the plaintiff had no right of suit,

Writ of Waste 11
bills.

because he had not the immediate remainder, and also had no remedy at law. Lord Hardwicke said, the decaying nature of the timber made no difference, and that it was an accident only, that the plaintiff could bring no action at law, and that the trustees to preserve might have supported a bill to stay the waste ; and that if the defendant should die without sons, the plaintiff would have an interest in the mast and shade of the timber.

As regards the completeness of the remedy in Equity, in cases of mere legal waste, there is no doubt that, in all instances in which an injunction is issued to prevent further waste, an account of the waste already done, and payment of its value, will be decreed, if the plaintiff be a tenant in fee simple or in fee tail ; and this, upon the principle of preventing double proceedings for the same matter, usually called "circuitry of action ;" but it is doubtful whether the account would be given, even to a tenant in fee or in tail, if no injunction were issued ; as, for instance, if it be not applied for, until all the damage has been done, or the defendant's interest has ceased ; and it is further doubtful, whether a tenant for life in remainder has sufficient interest in the timber to justify an account at his instance ; unless he be declared to be without impeachment of waste, in which case his interest might, perhaps, be considered, in Equity, as equal to that of a tenant in fee, for the purpose of having an account taken, and the value secured to abide the contingency of his life interest falling into possession ; because he might contend, upon some modern authorities, discussed in these pages (see p. 145), that he is entitled to have the produce of the waste paid over to him.

The notion that, in cases of legal waste, no account will be directed in Equity, if an injunction is not issued,—in other words, that the account is incident to the injunction,—is founded upon Lord Hardwicke's decision in *Jesus College v. Bloome* (3 Atk. 262, 1 Amb. 54), in the year 1745. In that

case, the College, as lessors, brought their bill against their lessee for years, after the term had been assigned over by him, and, consequently, after his connection with the land had ceased. [Atkyns says the suit was against the *assignee*; but this must be a mistake.] The bill sought only an account and payment of the value of waste in cutting trees, and carrying away stones, by the defendant, during his tenancy. The bill was dismissed, on the ground that the remedy at law, by an action of trover, was complete, and that the amount in question was very small. The reports in Atkyns and Ambler say the dismissal was with costs; but Lord Hardwicke himself, in his written judgment, in *Garth v. Cotton*, printed in Dickens (vol. i. p. 183, and see 211), says the dismissal was without costs; and he seems anxious to guard himself against being supposed to have laid down the rule that no account of legal waste was to be given, except as incident to an injunction. His statement on the subject is this: "It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction. In support of this notion, only one case was cited, *Jesus College v. Bloome*, which was before me Nov. 13, 1745. The lessee of the College had, during his lease, cut down some trees, and taken away some stones, and materials of [qy. off] the premises, and converted them to his own use. The term was expired, and a new lease granted to a stranger; and the College brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in Equity was maintainable, without praying an injunction to stay the waste; and it stood over to another day to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined; nor was that the only ground of the dismissal; but I was of

opinion that, at the utmost, it was in the discretion of the Court; and if the College had a right, they might clearly bring an action of trover at Common Law; and it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired."

There is authority of earlier date, *Bishop of Winchester v. Knight* (1 P. W. 406), for saying, that if the effect of waste, in timber or otherwise, is, that a profit has accrued to the person doing it, he may be made liable to an account in Equity. Lord Cowper there says, in the year 1717-18: "It would be a reproach to Equity to say, where a man has taken my property, as my ore or timber, and disposed of it in his lifetime, and dies, that, in this case, I must be without remedy." It may, however, be said that this was put as a demand against assets; and the case seems to have been the subject of an observation by Lord Eldon, which will presently be quoted.

In *Lee v. Alston*, which was three times before Lord Thurlow, viz., in the years 1779, 1783, and 1789 (reported on the first two occasions in 1 Bro. C. C. 194, and on the third in 3 Bro. C. C. 37, and 1 Ves. Jun. 78), he gave the account, although (see Brown) no injunction was prayed; and, after saying he had no doubt that an action of trover might be maintained, he said (see 1 Ves. Jun. 82). "If you can make out that the plaintiff has no right to come here, but ought to be left to law, I will turn round her bill, because she has not brought an action; but I thought the circumstance of timber having been wrongfully cut down entitled her to the account, as in the case of a bailiff. If a man enters upon another's lands, and makes money of his property, he will be considered as a bailiff, and must account."

It has been observed by Lord Brougham, that neither *Jesus College v. Bloome*, nor a case of *Sayer v. Pierce* (1 Ves. Sen. 232), which related to mines, was cited before Lord Thurlow, in *Lee v. Alston*; but it is unlikely that *Jesus*

College v. Bloome was absent from his Lordship's mind ; for *Garth v. Cotton*, which explains it so fully, had been cited to him. As regards mines, an account of them is given, as Lord Hardwicke had said, because the digging of mines is a sort of trade (see 1 Ambl. 54). The case in which Lord Brougham observed upon *Lee v. Alston* was, itself, a case of mines (*Parrott v. Palmer*, 3 Mylne & Keen, 632) ; and therefore his Lordship's observations, although of force and authority, were unnecessary, and, consequently extra-judicial.

It will, however, be proper to add, that in *Pulteney v. Warren*, 1801 (6 Ves. 73), which was a bill in Equity for mesne profits, which had been lost at law by a party's death during an injunction, a dictum of Lord Eldon is reported in these words : " As to timber, the equitable jurisdiction is put by him [Lord Hardwicke] upon this, to prevent a multiplicity of suits ; and the Court, having jurisdiction with regard to the waste, takes the whole together ; but he states expressly, that if there is not a ground to restrain waste, the party must go to law. The case of tithes is also very different. When severed, they belong to the tithe-owner. It is an acquisition of property, as stated in *Hambly v. Trott*, put into the possession of a party who ought to give it to another. Upon the *Bishop of Winchester v. Knight*, therefore, and all these cases, there must be, either a difficulty to recover at law, or fraud, concealment, &c., which enables the party to say otherwise than that, if he had gone to law, he would have recovered. There is, therefore, no analogy arising from these cases."

These remarks will, perhaps, be thought not very conclusive reasoning, against an account of timber without an injunction ; and the case of tithes will be thought to be in favour of such an account, rather than against it. It seems, however, that in 1804, Lord Eldon again said : " In cases of waste, the account certainly goes merely upon the injunction " (9 Vesey, 346) ; but the case, before him then (*Grierson v. Eyre*), related to a

very different subject ; and in the year 1807, upon a motion, by a lord of a manor, to restrain waste (*Richards v. Noble*, 3 Mer. 673, appendix), it is said, that the counsel for the Bill (Leach & Bell), "admitted that, without the prayer for an injunction, the plaintiff could not have an account."

In *Whitfield v. Bewick* (or *Bewit*, 2 P. Wms. 240), an account of legal waste, in timber cut, seems to have been given by Lord Macclesfield, as incident to a discovery ; perhaps no injunction being prayed, except as to opening mines ; but this would be an unsafe ground to proceed upon, in modern times, when the proper office of discovery is understood to be, to afford evidence, either in aid of an action at law, or as a ground for equitable relief, in a matter of clear equitable jurisdiction, in the same suit ; and there is no jurisdiction to give discovery for its own sake.

Independently, however, of all controversy upon the question, whether the account ought to be incident to an injunction, there is a general jurisdiction, in Equity, to decree an account and payment, in all cases in which the nature of the case shows that the account will be too complicated to be taken at law, or that it involves cross demands which cannot be there adjusted ; and another ground of applying to equity, for an account of legal waste, would seem to exist, when no action of trover could have been brought, at the time of the wrong done, or afterwards, within the time allowed for bringing personal actions. The great case of *Garth v. Cotton*, before Lord Hardwicke (3 Atk. 751 ; 1 Ves. Sen. 524 & 546 ; 1 Dick. 183), seems to be of this kind. The best report of it is in the 1st Vol. of White and Tudor's Leading Cases in Equity ; and that is, indeed, the only report which deserves to be consulted.

Garth v. Cotton was a bill against a living person, for an account (see 1 Dick. 210), and payment, of mere legal waste, done thirty-four years before.

Mr. Garth, the plaintiff's father, was tenant for 99 years, if

he should so long live, without impeachment of waste, "voluntary waste excepted,"^o with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons successively in tail male, with remainder to the defendant, Sir John Hind Cotton, in fee.

In 1714, Mr. Garth, having been long married, and having no son, agreed, with Sir John Hind Cotton, that timber should be cut, and the produce equally divided. This was done; and the share of each was about 1000*l*. The trustees to preserve did not interfere [and perhaps were in ignorance]. In 1716, Mr. Garth's wife died. He afterwards married again, and had a son, the plaintiff, born in 1724, who became tenant in tail male. In 1727, Mr. Garth died. In 1745, the plaintiff came of age, and suffered a recovery; and, in 1748, he brought the present bill against Sir J. H. Cotton, who was still living, praying the account, payment, and interest [probably from 1714].

Sir J. H. Cotton, by his answer, admitted the main facts, and that his receipts were about 1000*l*. The cause appears to have been heard on bill and answer only. The hearing was in July, 1750, when Lord Hardwicke took time to consider, and afterwards ordered a second argument, which was had in Michaelmas Term following. Judgment was not given till Feb. 1753. Since the last argument, Sir J. H. Cotton had died, and the suit had been revived against his executors, who admitted assets.

The case was new; but Lord Hardwicke decided in the plaintiff's favour, mainly upon these grounds, first, that the plaintiff had no remedy at law, by trover or otherwise, because he was not in existence when the conversion was made; secondly, that the trustees to preserve had committed a breach of trust by failing to prevent the waste, and that Sir J. H. Cotton must be deemed to have concurred with them in it, and thus to have shared their liability; thirdly, that he had derived profit from the transaction; and, fourthly, that

the affair was a sort of fraud upon the possible owner of an earlier estate of inheritance. The decree was, therefore, for 1000*l.*, and interest at 4 per cent. from the filing of the bill. As to the interest, it was asked, at the bar, from the year 1714, on the ground that the plaintiff had lost the advantage of the possible growth of the timber; but this argument was rejected by the Court, because there was nothing to show what would have been the state of the timber at the father's death. It might have been then in decay.

The exception of "voluntary waste" was held to confine the effect of the words "without impeachment of waste" to mere permissive waste, as to which it has been held, in very recent times, that there is no enforceable liability, in Equity, against a tenant for life, of either a legal or an equitable estate: *Lansdowne v. Lansdowne* (1 J. & W. 522); *Powys v. Blagrove* (Kay, 495, 4 D. M. & G. 448). The words "voluntary waste" have, however, in a case before Lord Romilly, received an intermediate construction. See *Vincent v. Spicer*, already mentioned (22 Beav. 380, *ante*, p. 49).

The collusion between tenant for life and the present remainderman may, perhaps, be the best ground of Lord Thurlow's decree in *Williams v. Duke of Bolton*, already stated, (1 Cox, 72, and 3 P. W. 268, n., *ante*, p. 129), in which case the duke himself filled both those characters.

The doubt whether Equity will give an account of waste, where it cannot give an injunction, that is, whether it will give it at all, except as incident to an injunction, rests upon the supposition, that the plaintiff has a remedy at law for the value of the waste, either by way of trover, or by way of money had and received to the plaintiff's use; but this remedy can belong to him, only in cases where his right to the property is absolute, as tenant in fee or in tail, and not partial only, as tenant for life; and, moreover, it can apply only to cases of legal waste, as distinguished from equitable waste, of which

Courts of law have no cognisance. There have been several instances, however, in modern times, of resistance to a decree for an account of equitable waste against the assets of deceased persons. The chief of these are *Lansdowne v. Lansdowne* (1815), *Ormonde v. Kynnersley* (1820), and *Duke of Leeds v. Lord Amherst* (1846). In the first (1 Mad. 116), the bill was filed by a tenant for life, and an infant as tenant in tail, and certain trustees, against the administratrix of a deceased tenant for life without impeachment of waste, for the value of equitable waste in trees, and also of permissive waste by dilapidations. A general demurrer to this bill was overruled by Sir Thomas Plumer, V.-C., upon the double ground, that "the Court never sends a party to law in cases of equitable waste, they being exclusively of equitable cognisance," and that, by the equitable waste, the estate of the late tenant for life had been benefited; and the Vice-Chancellor said that, "as at law [citing *Hambly v. Trott*], if legal waste be committed, and the party dies, an action for money had and received lies against his representative, so, upon the same principle, in cases of equitable waste, the party must, through his representatives, refund in respect of the wrong he has done." At the hearing of the cause, the same Judge, as Master of the Rolls (1 J. & W. 522), decreed an account of the equitable waste, but not of the dilapidations.

In *Ormonde v. Kynnersley*, before Sir John Leach, V.-C. (5 Mad. 369), a decree was also made, after opposition, for an account of equitable waste, in trees, by a deceased tenant for life; the Vice-Chancellor saying, that the restraint upon the legal owner, as to equitable waste, was founded on a trust, implied, in Equity, from the subsequent limitations, and from the presumed intention of the testator that he meant an equal benefit to all in succession; and that, in all cases, the assets of a testator were answerable for a profit made by breach of trust. Although, in this case, the Vice-Chancellor afterwards reversed his own decree, upon a rehearing, that

reversal was made only upon the ground (now brought to the Court's attention) that the plaintiffs were not the persons entitled to the value of the equitable waste done [see 2 Bligh, N. S. 386 ; *suprà*, 134] : and the authority of the decision for general purposes is not affected.

The *Duke of Leeds v. Lord Amherst and others* (14 Sim. 357, 2 Phill. 117), was a demand made, in 1840, by the duke, against his father's executors, for equitable waste done in the year 1809. The father was then tenant for life, without impeachment of waste, with remainder to his son in tail male, of the Kiveton (or Keeton) estate, in Yorkshire, upon which stood Kiveton Hall, which had been the principal house of the Leeds family, with a park attached, containing timber which had been planted or left standing for ornament. Under a different title, the father was, at the same time, tenant for life of Hornby Castle and its estate, with remainder to his son in tail male. This had been the chief house of the Holderness family, whose title was extinct. In this state of things, in 1809, the father pulled down Kiveton Hall, felled much of the timber planted or left standing for ornament, and converted the park into a farm. The materials and the timber were applied to his own use. The son was then only eleven years old ; but in 1819 he became twenty-one ; and then father and son, who were both living abroad, suffered a recovery of both estates, and settled them to such uses as they should jointly appoint, and, subject to that power, to the old uses. They subsequently raised money under the power, for the purposes of both of them ; but it seems that the father, before his death, paid off the money raised for himself alone (see 2 Phill. 119). No further disposition of either property was made by them. The marriage of the son, in 1828, created an estrangement between them, at that time, which continued so long as the father lived, notwithstanding several ineffectual efforts to agree upon a settlement of the estates. It seemed that, in

1828, the son became aware of the equitable waste of 1809, and was told that he had a demand against his father in respect of it. The father died in 1838; and it is to be inferred, from Mr. Simons' report, that the son then barred the new entail (see 14 Sim. 359). Upon the successive hearings of the cause, before Sir L. Shadwell and Lord Cottenham, the defendant's argument turned chiefly upon the lapse of time and supposed acquiescence. Both judges expressed a clear opinion upon the right to enforce the demand, for equitable waste, against the father's estate, and overruled the objections as to time and acquiescence, or rather forbearance; Lord Cottenham expressly deciding, that the time did not begin to run, so as to bar the demand, until the estate of the tenant in tail came into possession; because, if he had died before his father, his right would have been gone. The decree was for an account and payment of the produce of the equitable waste, with interest at 4 per cent. from the father's death. As to the time from which interest was to be computed, no argument is reported. By giving it only from the father's death, his estate was left in possession of the income of the waste for nearly thirty years. Possibly, the Court meant, that the debt should carry interest, in the plaintiff's favour, only from the time when it became imperative upon him to enforce it, unless it was to be barred by the Statute of Limitations.

Lord Cottenham, in this case, treated the question, whether the tenant in tail knew of his right or not, as being immaterial, provided he prosecuted it in due time (which he seemed to think was twenty years) after his father's death; but it might have been brought to the Court's attention that there was authority for saying that the right of a tenant in tail is an absolute right to the capital of the waste, which vests in possession immediately upon the waste being done, notwithstanding the uncertainty whether he will ever live to come into possession of the estate; see *Udal v. Udal*, *Whit-*

field v. Bewick, *Lee v. Alston* (all above mentioned), as to legal waste, and *Ormonde v. Kynnersley* as to equitable waste (2 Bligh, N. S. 374, 7 L. J. O. S. 150; 8 *ib.* 67, and note to 15 Beav. 10). This does not seem to have been argued for the defendants; but *Powlett v. Duchess of Bolton* (3 Ves. 374, *ante*, p. 130) was cited for the plaintiff, to show that if the produce of the waste had been invested, the son would not have become entitled to it, unless he had survived the father. In *Ormonde v. Kynnersley*, Lord Cottenham had been counsel.

Probably, it may be said, with accuracy, that although a *sv. Bick v. Wolfe v. Bick 9 Eq 603* suit *may* be maintained, by the remainderman, immediately upon the waste being done, it is not imperative upon him to bring it, until his estate in the land comes into possession.

It will be proper, however, to mention that Lord Romilly, in 1860, in *Harcourt v. White* (28 Beav. 303), on a bill filed, by a tenant for life in remainder, for an account of waste in timber done by a deceased tenant for life, dismissed the bill, solely on the ground of delay. The suit was brought a little less than twenty years after the death of the alleged wrongdoer, but considerably more than twenty years after the waste done; and his Honor appears to have thought that the plaintiff knew of it at the time, and ought to have proceeded at once to complain.

It is true that the waste was legal, being an excess of a prescribed limit, allowed to the successive tenants for life; but the decision was not put at all upon that ground; nor was it put on the ground of the plaintiff (a lady) being tenant for life only; and, indeed, in this respect, her case was peculiar, because she complained that, by her predecessor's excess of cutting, she had lost part of her own right in that respect; and she asked for part of the capital, to represent that loss, as well for the income of the remainder. Nor was the decision put upon any statute of limitations; for if it had been, the reasoning of Lord Cottenham in *Leeds v. Amherst*

would have been in point, as showing that time must run only from the death of the late tenant for life ; but it was put merely upon the general equitable principle of promptness of complaint ; as to which, the case deserves very serious consideration.

CHAPTER XVIII.

LIABILITY TO POOR-RATE.

THE statute 43 Eliz. c. 2, the first of the present series of Poor Law Acts, makes "saleable underwoods" liable to be rated. Upon these words, alone, still depends the only liability of wood to be rated for the poor. That timber is not rateable, whether it be oak, ash, or elm, or whether it be such other trees as are timber by local custom, seems always to have been considered clear; see *Rex v. Minchinhampton* (3 Burr. 1308), *Rex v. Mirfield* (10 East, 219); but what other wood is meant, by the words "saleable underwoods" has been matter of more doubt. The result seems to be, that no wood is so liable, but such as is cut as underwood, at regular and accustomed intervals; and that as to such, it is liable to an annual rate, although the practice be that several years must separate the respective cuttings; see *Rex v. Mirfield*, *suprà*, *Rex v. Ferrybridge*, 1823 (1 B. & C. 375), *Rex v. Narberth-North*, 1839 (9 A. & E. 815). In the notes to *Rex v. Ferrybridge*, are collected some very old authorities, to show, that saleable underwood means, necessarily, wood which, when cut, grows again from the stubs; that it is a thing of perpetuity, to which custom may extend; that it can pass by a grant of it *eo nomine*, without passing the soil; and that, strictly speaking, it is what grows under other wood; see in particular the case of *Hoe v. Taylor* in 37 Eliz., six years only before the statute; (Cro. Eliz. 413, 4 Co. 31, Moore, 355, Co. Lit. 58, Jenk. Cent. 274, 1 B. & C. 382, n.). In *Rex v. Ferrybridge*, firs and larches were held not to be

saleable underwoods, for the reason, amongst others, that, upon being cut down, they do not grow again, and that there is no regular course of cutting them for sale. The Court abstained from deciding whether they could, in any sense, be considered underwood, *simpliciter*. In *Rex v. Narberth-North*, the wood cut was what grew from stubs; but because it was not cut, or capable of being cut, in a regular course, it was held not to be "saleable" within the meaning of the statute.

*As to prescriptive right for Lord of a Rape to take all
trees growing in the high lands of the hundreds of his
Rape Pelham or Wiatt 1 Rolle Abr 592 H 6.*

CHAPTER XIX.

LIABILITY TO IMPROVEMENT OF ROADS.

By the General Highway Act of 1835, 5 & 6 W. IV. c. 50, ss. 64, 65, and 66, it is provided, that no tree, bush, or shrub shall be afterwards planted on any carriage-way or cart-way, or within fifteen feet from the centre of it; and, if planted, it must be removed, within twenty-one days after notice from the surveyor, upon pain of 10s.; and if the surveyor shall think that any carriage-way or cart-way is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament, or for shelter to any hop-ground, house, building, or courtyard of the owner thereof) growing in or near such hedges or other fences, *and* that the sun *and* wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage-way or cart-way by any hedge or tree, any one justice may, on the surveyor's application, summon the owner of the land on which the hedges or trees are growing, to show cause, at a special Highway Sessions, why the hedges are not cut, pruned, or plashed, or the trees pruned or lopped, or why the obstruction should not be removed; and if an order to that effect shall be made by the Sessions, the owner must comply with it, within ten days after a copy of it shall be left at the abode of himself, his steward or agent, under a penalty of forty shillings; and if the order be not complied with by the owner, the surveyor may do what is prescribed by it, and the Highway Sessions may charge the expense on the owner, and levy it, with the penalty, by distress of his goods; but no

person is to be compelled, or any surveyor permitted, to cut or prune any hedge at any other time than between the last day of September and the last day of March ; and that no person shall be obliged to fell any timber-trees growing in hedges at any time whatsoever, except where the highways shall be ordered to be widened or enlarged, as mentioned in the Act [see sect. 82], or then to cut down or grub up any oak-trees growing in such highway or in such hedges, except in April, May, or June, or any ash, elm, or other trees in any other month than December, January, February, or March. A right of appeal to Quarter Sessions is given, if exercised within fourteen days after any order made by the Highway Sessions.

Upon these provisions, it has been decided, in error from the Court of Queen's Bench, in *Jenney v. Brook* (6 Q. B. 323), that the order of Highway Sessions, as to trees, must expressly state that they are not planted for ornament or shelter ; and that an order, defective in this respect, will be invalid ; and although it may not be appealed from, the surveyor will not be justified in acting under it ; and it is to be observed that the time of appeal against any order of Highway Sessions is fourteen days, viz, four days more than the time allowed for compliance with the order.

CHAPTER XX.

LIABILITY TO SUCCESSION DUTY.

By the Succession Duty Act, 1853, c. 51, s. 23, it is provided that where timber-trees or wood, not being coppice or underwood, shall be comprised in any succession, the successor shall be chargeable with duty upon his interest in the net monies, after deducting all necessary outgoings for the year, which shall, from time to time, be received from any sales of such timber-trees or wood ; and shall account for and pay the same yearly : provided that no duty shall be payable upon the net monies received from the sale of timber-trees or wood in any one year, unless such net monies shall exceed the sum of ten pounds ; provided that if the successor shall be desirous of commuting the duty, and shall deliver to the Commissioners an estimate of the net monies obtainable by him from the sale of such timber-trees and wood as may, in a prudent course of management of the property, be felled by such successor during his life, the Commissioners, if satisfied with such estimate, shall accept the same and assess the duty accordingly.

CHAPTER XXI.

PROTECTION TO TREES, ETC., BY CRIMINAL LAW.

BY the Criminal Law Consolidation Statute of 1861, c. 96, relating to larceny and other similar offences, after providing that all larcenies shall be of the same nature, it is provided, s. 32 *et seq.*, that any person who shall steal, or cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall, if the value of the article or articles stolen, or injury done, exceeds one pound, be guilty of felony, and punished as in the case of simple larceny. The same result is to attend a similar offence, elsewhere than in the situations thus described, if the value exceed 5*l.* Similar stealing or injury, in any place whatever, if to the amount of one shilling, may be made the subject of conviction by one Justice of the Peace, and of a fine of 5*l.* besides the value; and, for a second offence, a person may be convicted in like manner, and imprisoned, with hard labour, for twelve months; and a third offence is to be deemed felony, and punished as simple larceny: a provision is also made for persons stealing live or dead fences; and if the whole or any part of a tree, sapling, or shrub, or any underwood, or any part of a live or dead fence, being of the value of one shilling at least, shall be found in the possession or on the premises of any person, with his knowledge, and he cannot satisfy a Justice before whom he is taken or sum-

moned, that he lawfully came by it, he may be fined two pounds besides the value.

The same Act declares the punishment of simple larceny to be (unless otherwise specially provided for) penal servitude for three years, or imprisonment for two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

By the statute, c. 97, of the same year, 1861, relating to malicious injuries to property, provisions are made, s. 20, *et seq.*, for punishment of persons maliciously injuring trees, shrubs, &c., very similar to those provided by the statute, c. 96, with respect to stealing, or cutting, or rooting up with intent to steal; but the malicious injury, if of the value of one shilling, may, in the first instance, be punished at the discretion of a justice, either by a fine (as in the case of stealing), or by imprisonment for three months, with or without hard labour; and the punishment for a third offence, if the value of one shilling, is to be the same as in the case of stealing, except penal servitude. There is also a provision for malicious injury to fences.

CHAPTER XXII.

STATUTORY PROVISIONS FOR GROWTH OF TIMBER.

By the statute 35 H. 8, c. 17, "The Bill for the Preservation of Woods," very special and stringent provisions, supported by pecuniary penalties, were made, for compelling owners, both of "several" woods and also of woods in which other persons had rights of common, to preserve and fence certain proportions of their timber, and even of their underwood, instead of cutting it all down, and also for preventing woods being converted into tillage ; and this Act, which was temporary, was made perpetual, by the statute 13 Elizabeth, c. 25.

By the statute 29 G. 2, c. 36, reciting the statute of Merton (20 H. 3) for approvement of commons by the lord, and the statute Westm. 2 (13 E. 1), and a confirmation of them by statute 3 & 4 E. 6. c. 3, and reciting also the 35 H. 8, c. 17, an Act of 20 Car. 2, c. 3, for preserving timber in the Forest of Dean ; an Act of 9 & 10 W. 3, c. 36, for timber in the New Forest ; and that those Acts, as to the preservation of timber, had not been duly put into execution ; it was enacted, that all owners of wastes, woods, and pastures, in which others had right of common of pasture, might, with the assent of the major part in number and value of the owners and occupiers of tenements to which the right of common of pasture belonged, enclose and keep in severalty, for the growth and preservation of timber or underwood, any part of such wastes, woods, and pastures, for such time and in such

manner, and upon such conditions, as should be agreed by them respectively; and various provisions were made for compensation to the commoners; and for punishments of offences in enclosures.

By 31 G. 2, c. 41, additional facilities were given for carrying the Act of 29 G. 2, c. 36, into effect; and by 10 G. 3, c. 42, defects in previous enclosures under 29 G. 2 & 31 G. 2, were cured. The Act of 35 H. 8, c. 17, as extended by 13 Eliz. c. 25, was the subject of some comments in Sir F. Barrington's case (8 Co. 136, b); and it was also judicially construed so lately as the year 1834, in *Dibben v. Marquis of Anglesey* (2 Cr. & M. 722), where it was held that its provisions, as to commonable woods, did not extend to cases in which rights of common existed by grant, and not by immemorial usage. It appears, however, to have escaped the attention of counsel and the Court, in that case, that the statute 35 H. 8, c. 17, and so much of the 13 Eliz. c. 25, as amended and continued it, had been repealed, some years before,—viz., in 1827, by the stat. 7 & 8 G. 4, c. 27, and had not been re-enacted. That repeal was probably made by inadvertence. It was intended to be a repeal of such statutes and parts of statutes as related to larcenies and malicious injuries to property, and some other criminal offences, and to remedies against the hundred, with a view to their consolidation in subsequent Acts of the same Session; as the preamble shows; but although the penalties by which the statute 35 H. 8, c. 17, was protected were only pecuniary penalties, and were recoverable only by suit, the whole of that statute and so much of 13 Elizabeth as continued and amended it, were repealed. Other Acts, giving remedies, in the Criminal Law for stealing or other injuries to property in Trees and Woods, were repealed, either wholly or in part; and as to the 29 G. 2, c. 36, above-mentioned, so much only of it was repealed as related to certain remedies against adjoining parishes and

to personal punishments of offenders; and with that exception, its provisions were left in force. The total repeal of 35 H. 8, c. 17, seems to have been quite foreign to the purpose in hand.

INDEX.

- ACCOUNT (IN EQUITY),
 of legal waste, 160
 of equitable waste, 165
- ACTION, *patent 155*
 of waste, abolished, 154
 in the nature of waste, whether now competent, 154
- ADMINISTRATOR. *See* EXECUTOR.
- APPROVEMENT,
 of commons, 97
- ASSETS,
 of wrongdoer in trees, when liable, 89
 although forfeiture was the penalty imposed, *ib.*
 whether liable beyond produce of trees, 34
- ASH,
 is timber universally, 11
- ASP, OR ASPEN,
 not timber usually, 14
- ASSIGNEES,
 in Bankruptcy, their rights, 50
- ASSIGNMENT,
 of timber for botes, what is, 6
- ATTACHMENT,
 court of, in forest, 120
- AVENUES, 31. *And see* RIDES.
- BANKS,
 of streams, not to be injured by cutting trees, 5
- BEECH,
 is timber, by custom, in Bucks, 11
 Buriton, Hants, *ib.*
 Mickleham, Surrey, *ib.*
 Yorkshire, *ib.*

BIRCH,

is timber, by custom, in Berks, 11
Yorkshire, *id.*

BISHOPS,

their rights, 106

BOTES,

what, 4

BOUNDARY HEDGE,

to whom it belongs, 8 *trees in ownership 8*

BROWSE WOOD,

rights to, and abuses of rights, 115

BUSHES, 8**CATHEDRAL CHURCHES,**

to be repaired by timber on lands of dean and chapter, 103

CATTLE,

trees sheltering, or shading, 15

CAVENDISH ESTATE. See WELBECK.**CESSER,**

of purposes of ornament or shelter, 42

CHANCERY,

Court of, its jurisdiction, 158

cuttings of timber by, property in them, 141

CHARITY LANDS,

timber on, 108

CHASES,

what, 114

CHESTNUT TREES,

not timber, unless by custom, 14

CHURCHES,

when to be repaired by timber from glebe or churchyard, 99

CHURCHYARD,

when trees may be cut in, and by whom, 99

CLUMPS OF TREES,

ornamental, 36

COLLUSION,

between tenants for life and in remainder, 56

- COMMON,
 tenants in, 90
- COMMONS,
 open, approvement of, 97 ; and *see* MANOR, LORD OF.
- COMMON OF PASTURE,
 its effect on trees, 98
 of estovers, its effect on trees, *ib.*
- CONDITIONS,
 of sale, as to trees, 13
- CONSCIENCE,
 cuttings contrary to, 31
- CONTINGENT REMAINDERS,
 in timber, protected, 128
- COPING,
 i.e. enclosing, wood, 118
- COPPICE, 13
- COPYHOLDERS,
 their rights, 96
- COURTS,
 of the forest, 116, 119
- CRANBOURNE CHASE, 116
- CRIMINAL LAW,
 remedies by, 176
- CROWN,
 its rights over deans and chapters ; and bishops, 102, 106
 in forests, 114
- CURATES,
 perpetual. *See* PERPETUAL CURATES.
- DAMAGE,
 by cutting trees, whether to be computed beyond value of
 trees, 34
- DEANS AND CHAPTERS,
 their rights, 102
 their lessees' rights, *ib.*

DECAY OF TREES, * *Top*

existing or expected, will justify Court of Chancery in cutting them, 141

but not if planted or left standing for ornament, 55

DEER,

rights of browse wood for, 115

DEFEASIBLE,

tenants in fee. *See* TENANTS IN FEE DEFEASIBLE.

DELAY,

in suing, may be fatal, 168, 169

DELIVERY,

of timber for hotes, what is, 6

DEVISOR. *See* SETTLOR.

DISAFFORESTATIONS,

by Carta Forestæ, 116

by modern statutes, 121

DISFRANCHISEMENT,

of a chase, 116

DOTARDS,

meaning of, 8

DRIVES. *See* RIDES.

ELM,

is timber universally, 11

EQUITABLE WASTE, 24, 26

cognisable, properly, in equity only, 166 ; but *see* 35

ESTOVERS, 97

common of, *ib.*

ESTREPEMENT,

writ of, 154

EXCEPTION,

of trees from a lease,

construction of, 15

means sound trees only, ~~20~~ 20

its effect as to the soil, 16—20

exceptions of woods, 16

underwoods, *ib.*

on a sale - with right to remove in limited time 122

EXCHANGE,

of timber, not allowed, 9

EXCLUSION,

of objects, from view. *See* VIEW.

EXECUTOR,

when liable for waste of testator, 155, 164, 166, 167, 169

EXECUTORY DEVISE,

whether it prevents legal waste or equitable waste, 85

FENCES,

botes for, 5

FIRS,

not timber, 59

not saleable underwood, *ib.*, 171

FORESTS, ROYAL,

trees in, cannot be cut without licence, even on freeholder's own lands, 114

so of bushes, 115

enclosures within, 121

courts of, 119

laws of, 114

still enforceable, 120

FORFEITURE,

by copyholder, cutting trees without licence of lord, 97

unless there be custom of the manor, *ib.*

"FRUIT OF TREES,"

may mean fruit of timber-trees, 16

FRUIT-TREES,

waste to cut them, 14

unless past bearing, *ib.*

when excepted from lease, 15

meaning of such exceptions, 16

FUEL,

botes for, 5, 6

lessee's rights to, *ib.*

GAPS,

in plantations. *See* TEMPEST.

Impenchantable - *t for l none cut and sell then not timber
ready for cutting Re Harber 1438 W. 24. 37 p 5925*

GARDENS,

trees or shrubs in, not to be removed by lessee, 15
unless fruit-trees past bearing, *ib.*
or unless in trade of nurseryman, *ib.*

GERMINS,

of underwood, to be preserved, 3, 4

GLEBE,

trees on, when may be cut, and by whom, 91

GLOUCESTER,

statute of, 25, 152

HAZELS,

not timber generally, 7

HEDGE,

right to trimmings of, 7, 8
not to be grubbed up, 8 ; and see BOUNDARY HEDGE.

HEDGE-ROW. See BOUNDARY HEDGE.

HIGHWAY ACT,

provisions as to trees in, 173

HORNBEAM,

not timber generally, 7

HOUSES,

trees protected, as ornamental to, or sheltering, 42, 45
or with reference to occupation of, 35
not if house pulled down, 43
or disused by family, *ib.*
views from, 36

HUSBANDLIKE,

mode of cutting, not always imperative, 48

INFANT,

I am at one Tinsley wants in cutting of J
" " under wood
I am at one Tinsley wants in cutting of J
" " under wood
I am at one Tinsley wants in cutting of J
" " under wood
tenant in fee, his rights, 110
tenant in tail, his rights, 79
discussion of them, *ib.*

INJUNCTION,

in equity, 26—47, 155, 158
at law, 156

INTEREST,

on produce of waste, when given, 130, 165, 168

JOINTRESS,

- her rights, 27
- in tail, 27, 73

JOINT TENANTS,

- their rights between themselves, 90

JUSTICE SEAT,

- court of. *See* FOREST.

JUSTICES IN EYRE. *See* FORESTS.

LAND TAX REDEMPTION ACTS,

- sales under, 71
- effect of remedial statutes upon mistaken sale of timber, 72

Lards not fishes at common law or by custom of Cumberland or Westmorland 59.

LARCENY,

- in wood, 166

LESSEE,

- his rights against lessor, 2

LIME-TREES,

- not timber generally, 14

LINES,

- trees growing in, protected, 31

LOPPINGS,

- lessee's rights to, 6
- effect of allowing him to take them, from trees excepted from lease, 22

LUNATICS,

- how timber on their estates dealt with, 111
- rights to its produce, *ib.*

MALICIOUS WASTE,

- restrained in equity, 29

MALICIOUS INJURIES,

- punishment for, 177

MANOR, LORD OF,

- his rights against copyholders, 95
- in the waste, 97
- even within Royal Forests, 121

MARLEBRIDGE,

- statute of, 151

MINES,

timber cleared for working, must be not more than absolutely required, 5

MORTGAGOR AND MORTGAGEE, 94**NEW FOREST, 121, 178****NURSERYMAN,**

his rights, 15

OAK,

is timber universally, 11

ORNAMENTAL,

in fact, whether timber is, Court must sometimes determine, 50

but it generally adopts the settlor's taste, 39

PARK,

trees in, protected, 31

semble, not if the chief house has now been pulled down, 42

PANNAGE,

what, 117

PERAMBULATIONS,

of forests, what, 117

PERPETUAL CURATES,

their rights, 111

PERMISSIVE WASTE. See WASTE, PERMISSIVE.**PERSONAL ESTATE. See REAL AND PERSONAL ESTATES.****PLEASURE GROUNDS. See PARK.****POLLARDS,**

may be timber, if sound, 12, 13

POOR LAWS,

timber, not rateable under, 171

only "saleable underwood" is, *ib.*

meaning of this term, *ib.*

POWER OF SALE,

of lands, its effect on timber rights, 60

not validly executed, if tenant for life without impeachment of waste takes the timber's worth, 64

statutory provision for future mistakes in this respect, 72

PREBENDARIES,

their rights, 102

PREMATURE CUTTING,

of timber, 31—47

of underwood, 7

PRIVY SEAL,

for infant to suffer a recovery, 81

PROFIT,

made by waste, a ground of action at law, 155

also of account in equity, when, 160—165

PROHIBITION,

in waste, inapplicable now, 107, 150

PURLIEUS,

of forests, what, 117

RABY CASTLE,

case of, 29

REAL AND PERSONAL ESTATE,

rights between, in case of fee simple, 109

fee tail, *ib.*

for life, *ib.*

infants, 110

lunatics, 111

RECTORS,

their rights, 99

impropriate, 101

REGARD,

of a forest, what, 115, 120

REMEDIES,

at law, 151—157

in equity, 158—170

REPAIRS, *wood cut from one estate, not applicable to repairs on another p 119*

what kind of, justify cutting timber, 3, 10

the specific wood must be used in, 9

RIDES, *must be so applied in convenient time p 127, 128*

in a wood, 30, 39

whether they protect the whole wood, as ornamental, 40—41

same principles apply to drives, walks, vistas, 30

ROWS,

trees in, protected as ornamental, if so designed, 33, 36

SALE,

of timber, cut for repairs, not allowed, 9 ; and see POWER OF SALE

"SALEABLE UNDERWOODS,"

meaning of, 171

SALLOWS,

not timber generally, 7

SAPLINGS,

cutting of, is waste, 7, 24

never allowed in equity, 31, 33, 48

unless incidental, 48

SEASONABLE WOOD,

what is, 7

SEPARABLE PROPERTY,

in trees, from land, 18—21

SETTLOR,

his taste binding, 39

his habit of cutting trees in a wood may affect its rights to be protected as ornamental, 40

SHADE,

trees for, when protected, 15

SHELTER,

trees for, protected at law, 15

unless tenant be without impeachment of waste, 24

Shroding decision of right does not know out cutting timber 10 Ch App 355

SHROUDINGS,

rights to, 6

effect of allowing them to be taken from excepted trees, 22

SIGHT,

whether ornamental timber must be within, 37

SIZE,

proper for cutting timber, whether Court will decide, 48

SOIL,

when excepted or granted, by exception or grant of trees or woods, 18

STATUTES,

- Magna Carta, 151, 152
 Carta Forestæ, 116
 52 Hen. III., c. 23, Marlebridge, 151
 6 Ed. I., c. 5, Gloucester, 152
 13 Ed. I., c. 14, Westminster the Second, 153
 35 Ed. I., st. 2, Ne Rector prosternat, 99
 1 Ed. III., st. 2, c. 2, Foresta, 117
 45 Ed. III., c. 3, Sylva Cædua, 12
 22 Ed. IV., c. 7, Foresta, 117
 35 Hen. VIII., c. 17, Woods, 178
 13 Eliz., c. 25, Woods, *ib.*
 43 Eliz., c. 2, Poor-rate, 171
 16 Car. I., c. 16, Foresta, 119
 20 Car. II., c. 3, Forest of Dean, 178
 8 & 9 Will. III., c. 11, Costs in Waste, 154
 9 & 10 Will. III., c. 36, New Forest, 178
 29 Geo. II., c. 36, Woods, *ib.*
 31 Geo. II., c. 41, Woods, 179
 10 Geo. III., c. 42, Woods, *ib.*
 42 Geo. III., c. 116, Land Tax, Sales for, 71
 54 Geo. III., c. 173 ,, ,, 72
 57 Geo. III., c. 100 ,, ,, *ib.*
 57 Geo. III., c. 61, Foresta, 120
 7 & 8 Geo. IV., c. 27, Malicious Injuries to Property, 179
 9 Geo. IV., c. 14 (private), Cranbourne Chase, 116
 10 Geo. IV., c. 50, Foresta, 120
 3 & 4 Will. IV., c. 27, Real Actions, 154
 c. 74, Fines and Recoveries, 82, 139
 5 & 6 Will. IV., c. 50, Highways, 173
 16 & 17 Vict., c. 51, Succession Duty, 175
 21 & 22 Vict., c. 27, Sir H. Cairns' Act, Damages in In-
 junction—Causes, 34
 22 & 23 Vict., c. 35, Lord St. Leonards' Act, 72
 24 & 25 Vict., c. 96, Larcenies, 176
 c. 97, Malicious Injuries to Property, 177

STANDILS, 16

STOOLS,

- must be preserved, 3—7
 oak-trees from, if of twenty years' growth, are timber, by
 statute, 7, 12

SUCCESSION DUTY,
on timber, 165

SYLVA CAEDUA,
what, 7
statute of, 12

TASTE,
of settlor binding on the Court, 39

TEMPEST,
gaps made by, will justify cutting for uniformity, 47 ; and
see WINDFALL.

TENANT FOR LIFE,
his rights and disabilities, 23

TENANT IN TAIL,
his rights, 73 ; and see INFANT.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED,
his rights and disabilities, 75

TENANT FROM YEAR TO YEAR,
his rights, 2

TENANT FOR YEARS. See LESSEE.

TENANT IN FEE DEFEASIBLE,
his rights and liabilities, 84

THINNINGS,
rights to, 58, 59

THORNS, 6

THRIVING WOOD,
what, 48, 50

TIMBER,
what is universally, 11
what is by custom in different places, 11, 12
not subject to tithes, 12
nor to poor-rates, 171
but liable to succession duty, 175

TIME,
may be a bar in equity, 168, 169
when it begins to run, *ib.*

TITHE LAWS,
decisions on, show what is timber, by general law or by
custom, 12, 13

TOPPINGS,

lessee's rights to, 6

Tort waste is A 156

TRESPASS,

when the proper form of complaint, 18

TRUSTEES,

to preserve contingent remainders ; their duties as to timber and trees, 159, 164

if declared without impeachment of waste, their powers doubtful, 38, 50

UNDERWOOD,

treated as a crop, 7

must be cut at accustomed age only, *ib.*

mortgagor may cut it, 7

stools and germins of, to be preserved, 3, 4

liable to poor-rate, 171

unless of twenty years' growth, from oak stools, which is timber by statute of Sylva Cædua, 12

VALUE,

of waste, must be forty pence at least, 4

VERDERERS,

what, 120

VERT,

what, 115

VICARS,

their rights, 101

VIEW

exclusion of objects from, a reason for preserving trees,

41, 47

VISTAS, 30, 31. And *see* RIDES.

VOLUNTARY WASTE,

meaning of, 49

WALKS. *See* RIDES.

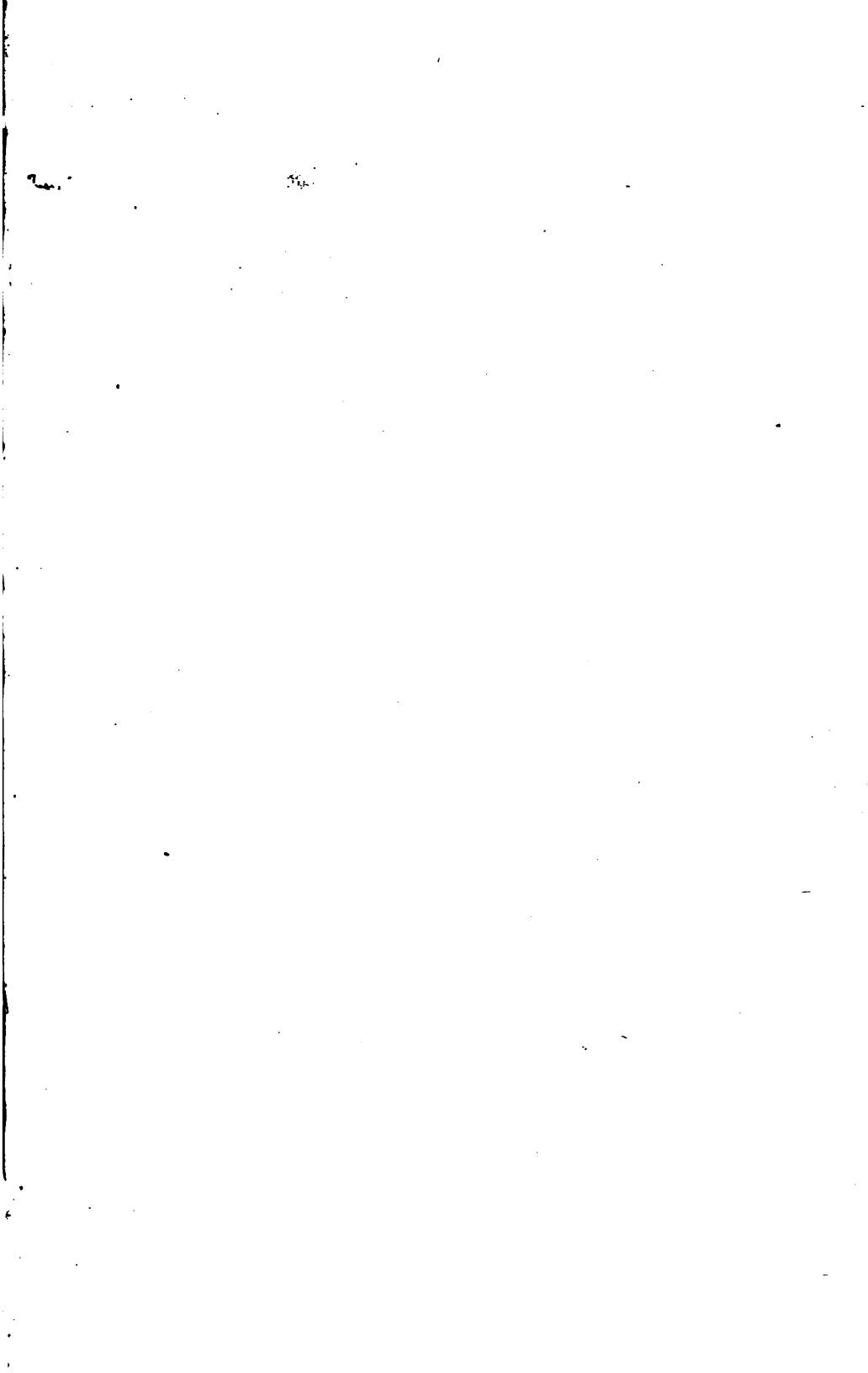
WALNUT-TREES, 14

WALTHAM FOREST, 121

WARRENS, 114

- WASTE, *without improvement of waste meaning of 24-26*
no claim to timber cut before his time 152
 legal, what is, 46, 47
 equitable, what is, 24
 permissive, 165, 166; and see WRIT OF WASTE.
What it is, a lost 141
- WASTE (LANDS) OF MANORS,
 rights to trees on, 97
 if within Royal Forests, 121
 enclosures of, *ib.*
- WELBECK,
 windfall at, 125
- WILFUL WASTE,
 meaning of, 29
- WILLOWS,
 not timber, 5, 12
 unless by custom, 12
 cutting of, must not injure bank of stream, 5
- WINDFALLS,
 property in, 123
 instances of, *ib.*
- WINDSOR FOREST,
 court in, 119
- WOODS,
 meaning of, 15; and see FORESTS.
- WOODLANDS,
 pass by the word "woods," 16
- WRIT OF WASTE,
 history of, 151
 abolished, 154
- WRONGFUL CUTTINGS,
 property in, 127

THE END.





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